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Transcript Appeals.

Vol. 1.

THE

FILE OF OPINIONS

IN CASES ARGUED BEFORE THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK,

DURING THE

JANUARY TERM,

1867.

FROM OFFICIAL COPIES CERTIFIED BY

JOEL TIFFANY, State Reporter.

SECOND EDITION WITH ANNOTATIONS BY

JAMES G. GREENE,

ROCHESTER, N. Y.

ROCHESTER, N. Y.

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TABLE OF CASES REPORTED

IN THIS VOLUME.

A

PAGE

Clark *v.* Ford..... 22
Artisans' Bank, Lake *v.*..... 71
Artisans' Bank *v.* Backers..... 75
Aubrey *v.* Fiske.....245

B

Babcock, Smith *v.*.....307
Backers, Artisans' Bank *v.* 75
Bank of Auburn *v.* Putnam....322
Bartholick, Merritt *v.*..... 63
Barton *v.* City of Syracuse....317
Blydenburgh *v.* Thayer.....221
Brandreth, People *v.*..... 10
Brooklyn City and Newtown R. R. Co., Sheridan *v.*..... 49
Brown, Rocknell *v.*.....278
Brown *v.* Vaughan.....348
Bruff *v.* Mali..... 96
Brush *v.* Lee..... 66

C

Cagger *v.* Dolan.....118
Case *v.* Hotchkiss 285
Chamberlain *v.* Dempsey.....257
Cisco *v.* Roberts.....297
City of Syracuse, Barton *v.*....317
Clark, Lawrence *v.*.....231
Clark *v.* Eighth Avenue R. R. Co. 105

PAGE

Cohn, Tobias *v.*.....346
Colburn *v.* Morton.....145
Commercial Bank of Clyde *v.* Marine Bank.....302
Cook *v.* Meeker..... 31
Cott *v.* Lewiston R. R. Co..... 26
Craig, Husted *v.*.....331
Curran *v.* Warren Chemical and Manufacturing Co..... 59

D

Davis, People *v.*..... 8
Day *v.* Saunders.....352
Dempsey, Chamberlain *v.*.....257
Dinsmore, Rosebrooks *v.*.....265
Diven *v.* Lee..... 54
Dolan, Cagger *v.*.....118

E

Eighth Avenue R. R. Co. Clark *v.* 105
Ely *v.* Supervisors of Niagara Co. 273

F

Fay *v.* O'Neil.....172
Ferris, Robinson *v.*..... 19
Ferris *v.* Union Ferry Co.....313
Fiedler *v.* Mead.....109

Digitized by Google

PAGE

Fiske, Aubrey *v*.....245
Ford, Clark *v*..... 22
Forward, Northwestern Ins. Co. *v*. 167

H

Hartshorne *v*. Union Mutual Ins. Co. 189
Hoe *v*. Sanborn.....160
Home Ins. Co., Wall *v*.....324
Hotchkiss, Case *v*.....285
Husted *v*. Craig.....331

I

Ives, Tompkins *v*.....266

J

Jervis, Parker *v*..... 88

K

Kelsey *v*. King.....133
Ketchum, N. Y. & N. H. R. R. Co. *v*.....116
King, Kelsey *v*.....133
King *v*. Mayor, &c., of New York 288
Kingsland, Noel *v*.....270

L

Lake *v*. Artisans' Bank..... 71
Lawrence *v*. Clark.....231
Lee, Brush *v*..... 66
Lee, Diven *v*..... 54
Lewiston R. R. Co., Cott *v*..... 26

M

Main *v*. Niles.....287
Mali, Bruff *v*..... 96
Mallory *v*. Tioga R. R. Co.....203

PAGE

Marine Bank, Commercial Bank of Clyde *v*.....302
Martin *v*. Smith..... 25
Mayor, &c., of New York, King *v*. 288
McCluer, Parker *v*.....240
McKee *v*. People..... 1
McLaren *v*. McMartin.....226
McMartin, McLaren *v*.....226
Mead, Fiedler *v*.....109
Mechanics' Bank of City of New York *v*. Straiton.....201
Meeker, Cook *v*..... 31
Merritt *v*. Bartholick..... 63
Morss, Ritchmyer *v*.....355
Morton, Colburn *v*.....145

N

New York Central R. R. Co., Renwick *v*..... 46
New York Central R. R. Co., Perrin *v*.....253
N. Y. & N. H. R. R. Co *v*.. Ketchum 116
Niles, Main *v*.....287
Noel *v*. Kingsland.....270
Norris, Sanford *v*.....350
Northwestern Ins Co. *v*. Forward 167

O

O'Neil, Fay *v*.....172
People McKee *v*..... 1
Parker *v*. Jervis..... 88
Parker *v*. McCluer.....240
People *v*. Brandreth..... 10
People *v*. Davis..... 8
People *v*. Vilas.....209
Perrin *v*. New York Central R. R. Co.....253
Phillips *v*. Terry.....235
Putnam, Bank of Auburn *v*....322

Digitized by Google

R

PAGE
Renwick *v.* N. Y. Central R. R. Co. 46
Reynolds *v.* Reynolds.....103
Ritchmyer *v.* Morss.....355
Roberts, Cisco *v.*.....297
Robinson *v.* Ferris..... 19
Rocknell *v.* Brown.....278
Rosebrooks *v.* Dinsmore.....265
Ruckman, Ward *v.*.....172

S

St. Nicholas Ins. Co., Stringham *v.*.....334
Sanborn, Hoe *v.*.....160
Sanford *v.* Norris.....350
Saunders, Day *v.*.....352
Saunders, Wright *v.*.....263
Sawyer, Van Benthuysen *v.*.....206
Shaw *v.* Smith.....238
Sheridan *v.* Brooklyn City & Newtown R. R. Co..... 49
Smith, Shaw *v.*.....238
Smith *v.* Babcock.....307
Smith *v.* Martin..... 25
Straiton, Mechanics' Bank of City of New York *v.*.....201
Stringham *v.* St. Nicholas Insurance Co.....334
Supervisors of Niagara Co., Ely *v.* 273

T

PAGE
Terry, Phillips *v.*.....235
Thayer, Bladenburgh *v.*.....221
Tioga R. R. Co., Mallory *v.*.....203
Tobias *v.* Cohn.....346
Tompkins *v.* Ives.....266
Trevor, Jr., *v.* Wood.....248

U

Union Ferry Co., Ferris *v.*.....313
Union Mutual Ins. Co., Hartshorne *v.*.....189

V

Van Benthuysen *v.* Sawyer.....206
Vanderzee *v.* Vanderzee..... 92
Vandusen *v.* Worrell.....224
Vaughan, Brown *v.*.....348
Vilas, People *v.*.....209

W

Wall *v.* Home Insurance Co.....324
Ward *v.* Ruckman.....172
Warren Chemical and Manufacturing Co., Curran *v.*..... 59
Wood *v.* Trevor, Jr.....248
Worrell, Vandusen *v.*.....224
Wright *v.* Saunders.....263

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Transcript Appeals.

JANUARY TERM,

1867.

ROBERT McKEE, PLAINTIFF IN ERROR, *v.* THE PEOPLE, ETC., DEFENDANTS IN ERROR.

Court of Oyer and Terminer—Appeals in Capital Cases—Laws 1855, *Ch. Laws* 1858, *Ch.* 330.

The act of 1855 (Laws 1855, ch. 337, as amended by Laws 1857, ch. 330) has no application to trials in Courts of Oyer and Terminer.

It applies only to cases where there has been a conviction for a capital offence in the General Sessions of the Peace in and for the City and County of New York.

Only in such cases, therefore, can the Court of Appeals grant new trials, whether or not exceptions have been taken in the Court below.

Scott Lord for Plaintiff.

J. H. Martindale, Attorney-General, for Defendants.

DAVIES, CH.J.—At a Court of Oyer and Terminer, held in the county of Livingston, in the month of February, 1863, the Plaintiff in error was convicted of the crime of murder in the first degree, and sentenced to be executed on the third day of April, then next ensuing.

The homicide was committed on the 18th day of November, 1861. On the 9th day of March, 1863, a writ of error was brought upon said judgment to the Supreme Court, and at a General Term thereof, held on the 16th day of December, 1863, the judgment was affirmed, and on the 31st day of December, in the same year, the writ of error, upon this latter judgment, was brought to this Court.

Competency of statements in presence of party. 154 *N. Y.* 379.

Admissions—Silence. 55 *N. Y.* 572; 175 *N. Y.* 98, 132.

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The cause was argued in this Court at the January Term thereof, held in 1865.

We then held that the sentence passed upon the prisoner was clearly erroneous; and in conformity with the provision of the act of April 24th, 1863 (this Court upon that occasion being of the opinion that the conviction of the prisoner had been legal and regular), directed the record to be remitted to the Oyer and Terminer, to pass the sentence prescribed by the act of 1860 (32 N. Y. Rep. 239). Upon this argument no question was made that the trial and conviction of the prisoner had not in all respects been legal and regular. Nay, this Court understood the learned counsel for the prisoner to concede upon that argument that it had been.

At the September Term of this Court, held in 1865, an application was made, on behalf of the Plaintiff in error, to this Court, for a reargument, on the ground that errors had intervened on the trial prejudicial to the prisoner, and which, in the opinion of his counsel, were sufficient to procure a new trial, and which had not been urged on the former argument, for the reason that it was supposed the point relied on was fatal to the conviction, and would, of itself, ensure the discharge of the prisoner.

Under the peculiar circumstances presented, this Court or-ordered a reargument, and the Court have now heard all the suggestions of counsel deemed important for the consideration of this Court. We do not propose to review the questions discussed and decided upon the former argument. They are there carefully considered, and received the general approval of the members of the Court. Those questions then passed upon must be regarded as finally settled, and not open to further discussion (Ratzky *v.* The People, 29 N. Y. 124). There remain to be considered the points now made by the counsel for the prisoner, on this reargument, and urged as reasons why this conviction and judgment should be reversed. The homicide was perpetrated under circumstances evincing premeditation, and a determination to take the life of the deceased.

He was the brother-in-law of the prisoner, and had been at

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the prisoner's house at an early hour of the evening of the homicide, and had sought admittance to the prisoner's house, and had been refused. The deceased then went to the house of Mr. Massey, the father-in-law of himself and the prisoner, and soon after his arrival there, the wife of the prisoner came to the same house with her infant child. A short time afterward the prisoner was heard outside the house calling upon the deceased to come out, which he did, and immediately the report of a gun was heard, and the persons in the house, going out, found the deceased had been shot, and was dead. The prisoner was there, and confessed he had shot him with his gun. Upon this state of facts, there would seem to be no question that human life had been taken under circumstances which the law characterizes as murder in the first degree. No question was made but that the prisoner had taken the life of the deceased, and the defence of insanity interposed, was fairly left to the jury, who, as the record states, "in a very few minutes returned to the Court, and rendered a verdict finding the prisoner guilty of murder in the first degree."

It is now urged that it was error in the learned Judge, at the trial, in not advising the jury there was no sufficient evidence of premeditation to warrant a verdict of murder in the first degree. It is a sufficient answer to this objection to say that no such request was made at the trial, and, consequently, no refusal and exception.

The act of 1855 (Laws of 1855, chap. 337), as amended by chap. 330, of Laws of 1858, has no application to trials in Courts of Oyer and Terminer. It is only when a conviction for a capital offence has taken place in the Court of General Sessions of the peace, in and for the City and County of New York, that this Court is authorized to grant a new trial, "whether any exception shall have been taken, or not, to the Court below."

But we think the law was correctly expounded to the jury. The Judge said: "In order to establish the guilt of the prisoner, two things are necessary: First, a corrupt intent, and second, a vicious will; that the fact of the killing of Roger Mc-

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Millan, by the prisoner, is not denied, and cannot be. The case presumes that a person taking the life of another, with a deadly weapon, intends to do it, and if a sane man so intends, it makes no difference whether he had a motive or not, for it is not necessary to look for a motive, when a person has been so killed with a deadly weapon, or with poison; and, if a man under the influence of passion or intoxication commits a crime, the law holds him responsible for it, though done in the heat of passion, and it is a question for you to determine, whether the prisoner killed McMillan with premeditation, or whether he acted in the heat of passion without premeditation." The authorities sustain the doctrine of this charge (The People *v.* Clark, 7 N. Y. 385; The People *v.* Rogers, 18 N. Y. 9; Willis *v.* The People, 32 N. Y. 715; Freeman *v.* The People, 4 Denio, 9).

We see no error in permitting the whole conversation which occurred at the time of the killing, in the presence and in the hearing of the prisoner, to be given in evidence to the jury. The witness had asked the prisoner if at the time he was in a passion, and he replied that he was. The prisoner's wife then, manifestly in exculpation of the prisoner, and to account for his being in a passion according to his statement, said that the deceased had broken her windows, and she gave that as the cause of the difficulty, and she said it was done that evening. The evidence was clearly competent. It was a statement made in the presence and hearing of the prisoner, and his silence must be taken as an acquiescence in its truth. It was important as tending to establish the anger and passion of the prisoner, and the motive operating upon him in taking the life of the deceased.

It tended to rebut the testimony that the shot was accidental, and strengthened the position that it was *designed* and intentional. It was part of the *res gestae,* and everything which happened in the immediate presence and hearing of the prisoner, at the time of the homicide, was material, and therefore admissible, as tending to show his motive for the act. It was correctly said by Parker, Justice, in The People *v.* Greene (1

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Parker Cr. Rep. 17), that "it was well settled that the maxim, *qui tacet consentire videtur,* was applicable to verbal conversations where there was a statement made in a party's presence, which was not denied by him. In such case the party had an opportunity to deny the statement at once, and not doing so, there was good reason for supposing he could not controvert it." The statement made by the prisoner's wife in his presence, of what she had told him, was clearly admissible (Jewett *v.* Banning, 21 N. Y. 27).

Joseph Massey, the father-in-law of the prisoner, was called to prove various acts and declarations of the prisoner, tending to show that the prisoner was insane. On his cross-examination, he testified, that upon an occasion mentioned, the prisoner came to the witness's house, and made threats of burning his house and shooting him, if he, the witness, would not come out of the house. That the prisoner said, "Come out, you old coward, I am a little boy." That the prisoner then kept still some time. The witness then remarked: "A week or two before this he had threatened to burn Bailey's barn. I told his wife I would have him taken up." On his redirect examination the witness testified: "Prisoner was not present when I had the conversation with his wife about the burning of the barn and taking him up, that he made no complaint of what I had said to his wife that night; he gave no reason why he was angry that night." The prisoner's counsel moved to strike out that part of the evidence relating to conversation between witness and prisoner; the Court denied the motion, and the prisoner excepted. The evidence objected to, consists in the statement of the witness, that, in a conversation he had with the prisoner's wife, in reference to a threat of the prisoner to burn a barn, he, the witness, would have him taken up. As it did not appear that this threatened action of the witness was ever communicated to the prisoner, or that he had any knowledge or intimation of it, it could never have had any influence upon anything the prisoner ever said or did.

It was wholly immaterial and irrelevant, and could not under any theory have worked any prejudice to the prisoner. From

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aught that appears, he was in entire ignorance that any such threat had ever been made, and no act of his could therefore have been based upon, or affected by it. The silence of the prisoner on this subject, leads to the inference that his wife had never mentioned the contemplated action of the father to him. The Judge might properly have directed the striking out of this testimony, but it was no error for him to refuse to do so.

For the reasons already stated it was wholly immaterial.

The declaration and statements of the prisoner could not be given in evidence, on his own behalf, for any purpose whatever. They certainly could not be to enable the witness to identify the prisoner, and were therefore properly excluded.

We see no error in what the learned Judge said to the jury in reference to the testimony of Dr. Bennett. He said to them: "If you find the prisoner, at the time Dr. Bennett was observing him through the hole in the wall, as described by the witnesses, was watching to see whether he was observed, and was regulating his conduct accordingly, it would raise a very strong presumption that the prisoner was feigning insanity, and indeed such evidence of design and calculation on his part, as to be in my opinion entirely fatal to his defence of insanity."

A reference to Dr. Bennett's testimony will show the circumstances under which he watched the prisoner; they were important to determine whether the insanity imputed to the prisoner was feigned or real. The doctor said he was looking through the hole, prepared so that he might observe the prisoner, and was looking through the hole when the prisoner was put into the west side of the jail. As soon as the sheriff closed the doors, the prisoner walked through the hall, going through the same motions as he had done before; he then walked back toward the hole, and as he did so the witness noticed his eye directed toward the aperture; it could be seen from the inside; he did it two or three times; he came near the aperture, passed to one side, and stood still a moment, he then crossed directly in front of the aperture to the other side; he then appeared to bend forward, and looked into the hole, and dodged back.

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The conduct of the prisoner as thus detailed, if he was watching to see whether he was observed, and was regulating his conduct accordingly, was most important for the consideration of the jury, on the issue whether the insanity claimed for the prisoner was real or feigned. If the jury came to the conclusion that the prisoner was watching to see if he was observed, and believed that he was, then his conduct clearly evinced such evidence of calculation and design as conclusively showed that he was not at that time at least insane. It certainly tended strongly to show that the defence of insanity was not founded upon fact, and the expression of the opinion of the Judge, that it was fatal to the defence of insanity, is not a matter of exception (Carver *v.* Jackson, 4 Peters, 1; Foster *v.* Steele, 5 Scott, 28; Belcher *v.* Prittie, 4 Moore & Scott, 295; Gardner *v.* Picket, 19 Wend. 186; Com. *v.* Child, 10 Pick. 252).

We see no error in any of the rulings upon the trial, and if the appropriate sentence had been passed upon the prisoner, the judgment would be affirmed. But, for the reasons heretofore given in this case, we reverse the judgment of the Oyer and Terminer, and of the Supreme Court, and in obedience to the mandate of the legislature, we remit the record, to the end that the appropriate sentence upon the conviction may be passed.

The judgment of the Oyer and Terminer, and of the Supreme Court, is accordingly reversed, and the conviction of the Plaintiff in error, being in the opinion of this Court legal and regular, is affirmed, and the record is remitted to the Oyer and Terminer of the county of Livingston, to the end that that Court may sentence the prisoner to suffer death for the crime whereof he stands convicted, and that he be confined at hard labor in the State prison at Auburn, until such punishment of death shall be inflicted.

All concur except GROVER and SCRUGHAM, who were absent.

Reversed.

JOEL TIFFANY,
State Reporter.

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THE PEOPLE, DEFENDANTS IN ERROR, *v.* AARON H. DAVIS, PLAINTIFF IN ERROR.

Non-Resident—Liquor License—Laws 1857, *Ch.* 628.

A license to sell intoxicating liquors in a town of which the licensee is not an inhabitant, affords him no protection for the sale of such liquors in such town.

The Defendant was convicted at the Yates County Session of a breach of the "act to suppress intemperance and to regulate the sale of intoxicating liquors" (Laws of 1857, ch. 628).

The offence charged was the unlawful sale of liquor, in quantities less than five gallons. In the first three counts it was alleged that the crime was committed at the town of Romulus, in the county of Seneca, and on the boundary of the counties of Seneca and Yates, and within five hundred yards of such boundary. In the fourth count, the offience was alleged to have been committed in the town of Torrey and county of Yates.

On the trial it was proved that liquor was thus sold by the Defendant, at a storehouse kept by him in the town of Romulus, within twenty yards of the boundary line of the town of Torrey, which is the boundary line between the counties of Seneca and Yates. The Defendant moved for his discharge, or the direction of a verdict in his favor, on the ground of variance between the proof and the allegation. The motion was denied, and the Defendant excepted.

The Defendant proved that he had received a license from the Commissioners of Excise, authorizing him to keep a hotel in the town of Romulus, and to sell liquor to be drunk on his premises.

In answer to this evidence it was shown that when he applied for the license and obtained it, he was not a resident of the town of Romulus, but resided in Yates County. The Court held that the license was no protection, and the Defendant was

Criminal law—Jurisdiction—Near County line. 38 *Hun,* 182.

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convicted, and the conviction affirmed at the General Term.

A. V. Harpending and *Charles S. Baker* for Plaintiff in Error.

John D. Wolcott, Dist.-Attorney of Yates, for Defendant in Error.

PORTER, J.—The offence charged was local; but there was no misdirection of the place at which it was committed. The sales were at the Defendant's store-house in Romulus, and within twenty yards of the county line. For the purposes of criminal jurisdiction, an offence is committed on the boundary between two adjacent counties, if perpetrated within five hundred yards of the boundary line. (2 R. S. 727, sec. 45.)

The District Attorney was properly permitted to prove that the Defendant was not a resident of the town in which he obtained his license. The Commissioners of Excise had no authority to sanction the sale of liquor in the town of Romulus, except by residents of that town. (Laws of 1857, ch. 628, sec. 2.) They could not acquire jurisdiction over non-residents by their own act in asserting it; nor could the Defendant enlarge their statutory powers by falsely claiming that he was a resident.

There was no error in permitting the jury to render a general verdict. Each of the counts was good, and each charged substantially the same offence; the variations being limited to the time and place of its commission.

The judgment should be affirmed, and the record should be remitted, with directions for the execution of the sentence.

All the judges concurring, judgment affirmed.

JOEL TIFFANY,
State Reporter.

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THE PEOPLE OF THE STATE OF NEW YORK *v.* BENJAMIN BRANDRETH AND OTHERS.

Set-Off— Powers of State Prison Agent—Debt against State.

Money borrowed by the State Prison at Sing Sing of a Bank for the purpose of purchasing supplies of food, &c., for the prisoners, does not constitute a debt against the State.

The agent of the Prison is not authorized to borrow money on the credit of the State.

This was an action brought by the People against Benjamin Brandreth and six others upon a bond dated May 28, 1860, by which they became sureties that the Bank of Sing Sing would repay all moneys deposited with it to the credit of the Treasurer of the State.

The facts are fully stated in the opinion of the Court.

Lyman Tremain for Appellant.

J. H.Martindale, Attorney-General, for Respondent.

GROVER, J.—The question principally argued by the counsel for the Appellant is not, I think, necessarily involved in the decision of this case. That question is whether in actions brought by the people counter-claims or set-offs can be interposed by the Defendant the same as in actions prosecuted by individuals. Neither do I think it necessary to determine whether the Defendants were at liberty to avail themselves of an indebtedness to the bank in this suit. The evidence offered and resisted upon the trial did not tend to show any indebtedness thereof, legal or equitable, in a legal sense of the latter term, of the State to the bank. That offer was to show that the State's prison at Sing Sing had borrowed money from the bankers, and had expended the same in purchasing supplies and food, &c., for the prisoners. This was the counter-claim set up in the answer, and this the Defendants offered to prove, and all they offered to prove. The case states that the evidence was rejected on the sole ground that in an action by the State

Counterclaim—In action by the State. 8 *Abb. N. C.* 138 (59 *How. Pr.* 165).

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to recover money, no counter-claim or set-off can be allowed, to which ruling the Defendants' counsel excepted. It is clear that error cannot be predicated upon the ground assigned for a ruling, or upon which it was made, when it appears clear that any different returns upon the question would have been erroneous. In the present case, if the evidence offered and rejected, in no possible view had a tendency to show any counter-claim by the bank against the State, its rejection was proper, and it was wholly immaterial to the Defendants upon what ground it was based. This applies only to cases where it is impossible to obviate the difficulty on trial. It only remains to show that the evidence offered had no tendency to show any counter-claim either at law or in equity in favor of the bank against the State. This appears from the total want of authority of the agent of the prison to borrow money on the credit of the State. It was not pretended that any such authority was conferred by any act of the legislature, even if that department of the government could confer such power up him. (See Const., Sec. 8, Art. 10.) Nor did any other department of government pretend to give him any such authority. All that appears is, that the agent wanted money for the use of the prison, and the bank loaned it to him. He had no color of authority to borrow upon the credit of the State. If he had, every canal superintendent, indeed nearly every administrative officer, possesses the same power. If this be so, it is utterly impossible to preserve any control over the State finances. It is clear that the agent had no power to borrow money. His so doing created no equitable or legal claim against the State, cognizable by the courts. The claim is entirely analogous to that of a party who should expend money to improve the real estate of a non-resident owner without his knowledge or assent. He would have no claim to reimbursement that could be enforced at law, or in equity .His only remedy would be to lay the facts before the owner, and be content with what he was willing to give. So in the present case, should the State consent to become suable in claims by individuals, no action for this claim could be maintained by the bank. Its only remedy is an application to the

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legislature, and content itself with what that body may deem justice in the premises.

Meantime this debt of the bank to the State, for which these Defendants have become sureties, should be promptly paid, and the judgment appealed from should be affirmed.

Concurring, BOCKES, SCRUGHAM, WRIGHT, and DAVIES.

For reversal, HUNT and PORTER.

HUNT, J. (dissenting).—This action was tried at the Westchester Circuit in September, 1864.

To maintain their action, the Plaintiffs introduced in evidence a bond signed by all of the Defendants, dated May 28, 1860, and upon the condition "that the Bank of Sing Sing shall well and truly pay, or cause to be paid to the Treasurer of the State of New York, all moneys deposited, or which hereafter may be deposited, to his credit as Treasurer of the State of New York, in the Bank of Sing Sing, by the agent and warden of the Sing Sing prison, upon presentation to the Bank of Sing Sing of the drafts or checks of the said Treasurer." It was admitted by the Defendants upon the trial, that between the 30th day of May, 1860, and the 18th day of September, 1860, there was deposited in the Bank of Sing Sing, by the agent and warden of the Sing Sing prison, of the earnings of prisoners, $59,753, and that of this sum there remained on deposit on the 3d day of September, 1860, the sum of $29,222.70; that upon that 3d day this sum was drawn for by a draft of the Treasurer of the State of New York, for the sum of $29,222.72, that the payment of said draft was refused, and the same was protested by non-payment. The excess of two cents in the draft, on the deposit, was not noticed on the trial, or on the argument, and is probably an error.

To sustain their defence, the Defendants offered to prove the following facts: First. That the State was and is indebted to the Bank of Sing Sing in the sum of $17,372.27, with interest from December 22, 1854. Second. That the Bank of Sing Sing is insolvent. Third. That said indebtedness arose from moneys borrowed by the agent and warden of the Sing Sing

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Prison, which were necessary and were used for obtaining supplies of food for the inmates of said prison. The Plaintiffs' counsel objected to the evidence, and the Court excluded it, solely on the ground that in an action by the State to recover money no counter-claim or set-off could be allowed, and directed a judgment for the Plaintiffs. Upon appeal to the General Term of the second district, the judgment was affirmed.

It is quite clear that the evidence offered by the Defendants did not establish a technical set-off. It failed in the indispensable qualification of not being a "demand due to the Defendants in their own right." (2 R. S. 353, 366.) It was in form, as asserted, a demand due to one not a party to the suit, to wit, the Bank of Sing Sing. It failed as a counter-claim substantially for the same reason. It was not a demand "arising on a contract and existing in form of the Defendants against the Plaintiff." (Code, § 150.) Conceding these propositions, I am yet of the opinion that the Court erred in excluding the evidence offered.

Viewing it as a question between individuals, the case before the Court was simply this: The Defendants were sureties that the Sing Sing Bank would pay to the People, on draft, all the money that should be deposited to its credit by the warden of the prison. There was a balance due on such deposits of $29,000 . The bank, however, had advanced to the People, through the same warden, the sum of $17,000, and if the bank had been the Defendant in the present suit instead of the sureties, no more than the difference between the two sums, to wit, $12,000, could have been recovered. The sureties are claimed to be liable for their principal in the sum of $29,000, while the principal himself is liable in the sum of $17,000 only.

Every man's sense of equity revolts at this proposition. It is inequitable and unjust, that a surety, always regarded with favor, should be compelled to occupy a position of greater liability than his principal. In a court of law, where justice is administered by rigid rules, and forms sometimes endanger right, the Defendants would be embarrassed by the existence

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of the propositions laid down by the Court below, that this defence was not a set-off because it was not due to the Defendants in their own right, and that it was not a counter-claim because it was not a demand existing in form of the Defendants against the Plaintiffs.

No such embarrassment, however, exists in a court of equity, whose powers are sufficiently extensive always to apply a remedy where a clear injustice is discovered to exist. Independently of all statutes, courts of equity, in virtue of their general jurisdiction, grant relief in cases of mutual debts or credits. (Story Eq. Jur. § 1435.) Then, where there is a legal debt upon one side, and an equitable debt upon the other, and where special circumstances exist requiring such interpretation, a joint debt may be set off against a separate debt, or a separate debt against a joint one. (§§ 1436, 1437.) "So if one of the joint debtors is only a security for the other, he may in equity set off the separate debt due to his principal from the creditor, for in such case the joint debt is nothing more than a security for the separate debt of the principal; and upon equitable considerations, a creditor who has a joint security for a separate debt, cannot resort to that security without allowing what he has received on the separate account, for which the other was security." (§ 1437.) See, also, *ex parte* Hanson, 12 Ves. 345. *Ex parte* Stephens, 11 Ves. 24, notes.

The bank is assumed by the proposition to have been insolvent, and if the Defendants were compelled to pay this amount, the same could not be collected from the bank, though admitted to be a just debt. The Defendants would be remediless.

The application of these principles relieves the case from technical difficulties, and entitles the Defendants to make the proof offered. See, also. Gillespie *v.* Torrance, 25 N. Y. 306; Code, § 150, last clause, as to the form of the defence.

Had the parties to this action been individuals, instead of the State being Plaintiffs, upon the doctrine established by these authorities there would have been error in excluding the defence offered.

It is claimed, however, that when the State is the Plaintiff,

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a different rule prevails, and that no demand can be set off against an established claim of the State, until it is audited by the proper accounting officers, pursuant to some statute. In their argument upon this point, the Plaintiffs insist that a demand against the State is not a debt, in the sense that it can be set off, and that it is at the most a "mere claim upon legislative conscience and discretion."

I cannot assent to this standard of estimating the obligation of a State or nation. The certain liquidated obligation of a State is governed by no lower rules, to say the least, than govern the obligations of individuals. It is in no sense a question of discretion nor of conscience, except of that good conscience which requires the rigid performance of acknowledged duty. If payable at a day named, the State is then bound to meet its obligation; and if held by the citizens of a foreign country, its non-payment is just cause of war. A failure to pay, whether to its own citizens or to strangers, subjects it to a disgrace, which can only be removed by a removal of the cause. Repudiation by a nation is the equivalent of fraudulent bankruptcy by an individual. It is true that a State cannot be sued, but this only makes more imperative the duty properly to meet all its pecuniary engagements.

Honor, morality, and duty, require it to perform its promises; and the fact that it cannot be arraigned in its own Courts, can furnish no justification for its refusal.

Nor am I aware of any rule of law which requires the obligation of a State to be submitted to its own auditing officers before it becomes perfect. Should the State expressly enact to that effect, it would then become a question whether such enactment did not enter into the contract and form part of it. But as no such statute has been referred to, we are not called upon to examine that question. The offer here tends to prove "an indebtedness to the State" in the sum named, and if an auditing constituted an essential element of an indebtedness, proof of such auditing would be included in the offer made.

Although a State cannot be sued, I think it is subject to a set-off, like individuals, when it comes into Court as a Plain-

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tiff, and that both upon principle and authority. When it becomes a suitor, it waives for the time its dignity as a sovereign. It lays aside its strong arm, by which it can at once enforce its own claims, and submits itself to the arbitration of the Court, and to its practice and its proceedings. For this purpose it is like an individual or an inferior corporation; and becoming voluntarily a party to a suit, no good reason can be given why it should not be bound by the same rules that are applicable to other parties in the same position. (State of Illinois *v.* Delafield, 8 Paige, 535; United States *v.* Arredondo, 6 Peters, 711, 712; The same *v.* Bank of Metropolis, 15 Peters, 377.) To the same effect is the statute (2 R. S. 553) which enacts that where suits are brought in the name of the People, they "shall be subject to all the provisions of law respecting similar suits and proceedings, when instituted in the name of any citizen, except when provision is or shall be otherwise expressly made by statute; and in all such suits the People shall be liable to be non-suited, and to have judgment of *nons fers* or discontinuance entered against them, in the same cases and in the like manner and with the same effect, as in suits brought by citizens, except that no execution shall issue thereon." The State is subject to the same rules of pleadings and of evidence, to the same practice, will submit to be dismissed from Court where an individual would be, subjects itself to a liability for costs, and makes no reservation whatever, except in the single instance that execution shall not issue against it. The costs are directed to be paid by the Comptroller upon production of the payment of the judgment record, and the certificate of the Attorney-General. (*Ib.*) I have no doubt that this statute does, and was intended to subject the State to a set-off, where a set-off would exist against an individual plaintiff.

The Plaintiff seeks to sustain the judgment of the Court below upon the further ground that the prison warden had no right to contract any debt with the bank for the purpose mentioned, and that therefore the evidence was properly rejected. If the evidence had been admitted, it could have been readily

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ascertained whether there was an indebtedness against the State which would properly form the subject of a set-off. We have no means of knowing what the evidence of the Defendants could be. They offered to prove that "the State was indebted to the Bank in the sum of $17,377.27, as alleged in the answer," and the answer alleged the indebtedness to have arisen from money furnished by the bank to the prison warden, for the purpose of the prison. They also offered to prove that "the same indebtedness arose from moneys borrowed by the agent of the prison, which are necessary and was used for supplies of food for the inmates of the prison." If in any possible form, or under and conceivable circumstances, an indebtedness could have arisen from this advance of money, then the evidence of the Defendants was improperly excluded. It will be observed that the offer does not state that the claim of indebtedness consists in or of the facts stated, but that it "arose" from these facts. If the legislature, upon a full statement of the facts, had directed the payment of the money through the Comptroller or Treasurer, and these officers had issued their draft or acceptance promising to pay it, I doubt not that this promise would have been an indebtedness to the State, and arising out of the transaction in the answer referred to, and would have constituted a valid set-off. Possibly a much less formal recognition would have made it a debt against the State. The Defendants are entitled to every possible assumption in favor of the evidence offered to be produced by them.

It is urged in this connection that this defence was not available, because the bank was not a party, and would not be bound by any statement of its indebtedness thus to be made. To this, as well as to the entire objection of the want of power to create a debt which we are discussing, it is a sufficient answer that no such objection was taken below.

The rule is that no dilatory objection can be urged here which was not taken at the trial, and the present instance illustrates the wisdom of the rule. If it had been claimed in the Court below that the bank was a necessary party, the obvious remedy would have been an order that the cause stand over for

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the purpose of making the bank a party. By now allowing an objection which the party omitted to interpose at the proper time, a valuable right of the Defendants would be destroyed.

The Plaintiff cannot, therefore, be permitted now to urge it.

The case states that the evidence was excluded "solely on the ground that in an action by the State no counter-claim or set-off can be allowed. The party should be held to this proposition.

I am of the opinion that the Court below erred in rejecting the evidence offered, and that a new trial should be ordered.

PORTER, J., concurred in the opinion of Judge Hunt.

Affirmed.

JOEL TIFFANY,
State Reporter.

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THE PEOPLE, EX REL. GILBERT ROBINSON, *v.* BENJAMIN FERRIS AND OTHERS, REFEREES.

Laying out Highway—Appeal—Referees— Powers of Supreme Court.

Where proceedings have been taken under the statute to lay out a public highway, and an appeal from the order of the Commissioners has been taken according to law, and Referees have been appointed by the County Judge to hear and determine the appeal, and the Referees have affirmed the order of the Commissioners laying out the road, and the proceedings have been brought before the Supreme Court on a common law *certiorari*, the Supreme Court have only authority to affirm or reverse such order of the Referees.

If the Court proceed further to vacate the order appointing such Referees, and order the appointing of a new board of Referees by the County Judge, &c., it transcends its authority, and such additional order is erroneous.

BOCKES, J.—This is an appeal from an order of the General Term of the Supreme Court in the Fourth District, made in a case brought before the Court by common-law *certiorari.*

Proceedings were taken under the statute to lay out a public highway through the enclosed lands of the relator, Gilbert Robinson, and one Stephen Temmerman, in the town of Argyle, Washington County, which resulted in an order by the commissioners of highways of the town laying out the proposed road.

An appeal from this order was taken as provided by law, whereupon the County Judge appointed three referees to hear and determine the appeal. The referees having notified the parties entitled to notice, proceeded in the execution of their duties, and finally (January 26th, 1858) made an order, concurring in and signed by two of their number, by which they affirmed the order of the commissioners laying out the road. The relator sued out a common-law *certiorari* directed to the referees, to which they made return of their proceedings, and on which return the case was heard and decided by the Supreme

Taxes—Assessment—Certiorari—Power of court on. 24 *Hun,* 68.

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Court. That Court made an order as follows: "Decision of the referees vacated; *order appointing them set aside, the appeal to stand, to be determined by a new board of referees, to be appointed by the County Judge.*" The case is here on an appeal from the latter portion of the order above italicised. It will be observed that the part of the order vacating the decision of the referees is not appealed from, and of course is not under review. That was equivalent to a reversal by the Supreme Court of the proceedings and order of the referees, and to that extent the order stands unchallenged before this Court. The propriety or validity of the remaining portion of the order is the subject of the present examination.

The *certiorari* was directed to the referees, and brought up for review only the proceedings and determination of those officers; and the only duty devolving on the Supreme Court was to affirm or reverse their proceedings and decision. This was the extent of the authority resting in that Court (10 Wend. 167; 3 Hill, 426; 5 Hill, 413; 7 Hill, 577). It did not bring up the proceedings prior to their appointment, or present any question in regard to the regularity or correctness of the order appointing them; and it must necessarily follow that it was erroneous in that Court to set aside such order and prescribe future action in the case. As above suggested, the authority of the Supreme Court was limited to a reversal or affirmance of the order and proceedings of the referees.

It is urged that the part of the order appealed from, if without authority, was simply void; and that no appeal from such part could, therefore, be taken to this Court. On the argument it was stated and conceded that a motion had been made to dismiss the appeal on this and other grounds, and that the motion was denied.

Such decision must conclude the parties as regards that question. Besides, it has been the constant practice of Courts of review to reverse judgments and orders granted without jurisdiction.

This is often the only way in which the records of the Courts can be purged of errors and dangerous precedents.

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In this case the error complained of doubtless occurred through the merest inadvertance, and could and would have been corected by the Supreme Court, on motion, or even suggestion, and that would have obviated this appeal. I am, therefore, directed to say as the opinion of the Court, that the reversal of the part of the order appealed from, should be without costs of appeal.

The part of the order appealed from reversed without costs.

All the Judges concurred in the above opinion.

JOEL TIFFANY,
State Reporter.

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EDWIN CLARK AND DAVID B. O. FORD, ADMINISTRATORS WITH THE ANNEXED OF THE ESTATE OF NATHAN FORD, DECEASED, AND AS OWNERS OF CERTAIN PORTIONS OF THE ESTATE OF SAID DECEASED, APPELLANTS, *v.* CHILION FORD, LATE ADMINISTRATOR OF SAID ESTATE, RESPONDENT.

Equity—Statute of Limitations—2. R. S. 114, § 9.

A Court of Equity will not allow proceedings for distribution of an estate by persons having a demand thereon, to be instituted after the expiration of the time allowed by law.

APPEALED from the judgment of the General Term, 4th District, reversing an order of the Surrogate of St. Lawrence County.

Nathan Ford died in 1829, leaving a will of real and personal estate, which was duly proved before the Surrogate of St. Lawrence County, and letters testamentary were granted to the executors therein named, all of whom died on or before April 2d, 1842, and letters of administration with the will annexed, were issued to Chilion Ford, the Respondent. He was

Executors—Accounting—Limitation. 111 *N. Y.* 217 (19 *St. Rep.* 85); 10 *Hun,* 101; 9 *Misc.* 234 (61 *St. Rep.* 299; 30 *N. Y. Supp.* 287); 15 *Misc.* 559 (74 *St. Rep.* 301; 37 *N. Y. Supp.* 1131).

36*Misc.* 745 (74 *N. Y. Supp.* 471); 68 *App. Div.* 159 (74 *N. Y. Supp.* 445); 4 *Dem.* 103; 5 *Dem.* 333 (7 *St Rep.* 710; 25 *Week. Dig.* 177); 1 *Con.* 449 (22 *St. Rep.* 886; 5 *N. Y. Supp.* 266); 2 *Con.* 160 (23 *Abb. N. C.* 479; 27 *St. Rep.* 37; 8 *N. Y. Supp.* 7); 2 *Con.* 537 (37 *St. Rep.* 576; *N. Y. Supp.* 535); 31 *St. Rep.* 480 (10 *N. Y. Supp.* 491).

Legatee—Right to accounting—Limitation. 153 *N. Y.* 322; 153 *N. Y.* 325; 4 *Hun,* 41. (6 *T. & C.* 234); 41 *Hun,* 211 (4 *St. Rep.* 151); 29 *App. Div.* 403 (51 *N. Y. Supp.* 709; 27 *Civ. Proc.* 312); 15 *Misc.* 559 (74 *St. Rep.* 301; 37 *N. Y. Supp.* 1131; 26 *Civ. Proc.* 17); 25 *Misc.* 280 (55 *N. Y. Supp.* 431); 3 *Redf.* 311; 2 *Dem.* 335.

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superseded as such administrator on the 13th July, 1850, and Edwin Clark and David B. O. Ford, the Appellants, were appointed in his place.

On the 16th June, 1860, the Appellants presented their petition to the Surrogate of St. Lawrence County, setting forth the above facts, and also stating that there had never been a general accounting by Chilion Ford as such administrator; that large sums of money came into his hands which belong to the residuary legatees of said Nathan Ford, or their assignees or representatives; and that the Appellant, Edwin Clark, is the owner, by assignment, of five-twentieths of the estate, and that the Appellant, David B. O. Ford, is the owner, as one of the residuary legatees, of one-tenth of the estate, and as assignee, of one-twentieth.

The petition is made by the Appellants as such administrators, and in their own right as such assignees and residuary legatees, and prays, "that said Chilion Ford may account for all of the property and effects of said estate that came to his possession, and may pay over the same."

Chilion Ford answered, "that he ought not to be required to account, because the time limited by law within which he might have been required to account as such administrator had elapsed long before the commencement of these proceedings, and that none of the claims of the petitioners against him as such administrator had accrued within the time limited by law for the commencement of proceedings to enforce the same, but were barred by the statute of limitations."

The Surrogate overruled this answer, and ordered him to render a final account. The Supreme Court on appeal reversed this order.

SCRUGHAM, J:

In proceedings instituted by successor of an administrator, to compel an accounting by his predecessor, the Surrogate cannot make any decree for the payment or distribution of such part of the estate as may remain to be paid or distributed, but he may do so when the proceedings are taken upon the application of a person having a demand against the estate either as

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creditor, legatee, or next of kin. (2 R. S. 95, § 71.)

The prayer of the petition to the Surrogate was not merely for an accounting, but also that the Respondent should be required to pay over to the petitioners the property and effects of the estate.

The petitioners applied in two characters: as successors of the administrators, and as persons having demands against the estate as legatees. There is no provision in the statute for such joint application, and the character of the proceedings instituted by the petition must be determined by the nature of the relief sought by it. If it had been merely for an accounting, it could be properly regarded as a proceeding by the successors of an administrator to compel their predecessor to account; but as it sought besides a decree of the Surrogate which could not be made upon such proceeding, but which might be proper upon an accounting, compelled by persons having a demand against the estate as legatees, it should be treated only as a proceeding instituted by the Appellants in that character.

The Respondent was appointed administrator with the will annexed on the death of the last executor in 1842, was superseded on the 13th July, 1850, and the Appellants did not present their petition until the 16th June, 1860.

An action at law is given by statute to legatees entitled to share in the distribution of an estate (2 R. S. 114, § 9), and it may be commenced at the expiration of one year from the granting of letters testamentary, or of administration.

This remedy was barred by the statute of limitations, long before these proceedings before the Surrogate were commenced.

Before the Revised Statutes, there was no statutory limitation of the time within which suits might be commenced in the Court of Chancery, and yet it was uniformly held, that when the claim was one which could have been enforced by an action at law, the statute of limitation which barred the remedy at law, would be applied to the suit in Chancery; that the equitable remedy, in a case of concurrent jurisdiction, is subject to the same limitation as the legal. John B. Murray, &c., v. John

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G. Costar, &c., 20 Johns. 576-610; Kane v. Bloodgood, 7 Johns. Ch. 91.

The principles upon which this doctrine was established in Courts of Equity, are equally applicable to proceedings in Surrogates' Courts, and it was accordingly held by the late Chancellor in McCarter v. Camel, 1 Barbour's Chancery Reports, 465, that the Surrogate could not entertain proceedings to enforce the payment of a distributive share of an estate, which were not instituted before the expiration of the time within which the distributee might have brought an action under the 9th section of the statute, to which reference has been made.

The judgment should be affirmed with costs.

All concur. Affirmed.

JOEL TIFFANY,
State Reporter.

LAURA P. SMITH, EXECUTRIX, &C., OF ANSON D. SMITH, DECEASED, RESPT., *agst.* RUSSELL MARTIN ET AL., ADMS., &C., OF JOHN K. COMSTOCK, IMPLEADED, &C., APPTS.

PARKER, J.—The Appellants in this case, when it was reached in its order on the calendar, failed to appear and furnish papers on which it could be heard. The Respondent appeared and submitted the case on her part, upon her printed brief, in accordance with the 25th rule of the Court. The Appellants have, also, failed since to submit points pursuant to the said rule.

The judgment must, therefore, be affirmed of course (Kelly v. McCormick, 28 N. Y. R. 323).

All concur except GROVER, Justice, who is absent.

Affirmed.

JOEL TIFFANY,
State Reporter.

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SAMUEL COTT ,EXECUTOR OF ISAAC COTT, DECEASED, v. THE LEWISTON R. R. CO., APPELLANTS.

Railroad Company—Duty of, on Diversion of Stream.

When a railroad company, in the construction of its road, finds it necessary to change the channel of a stream, and thus divert its course; and, for that reason, constructs a new channel to restore and preserve the stream in its former usefulness to owners of land through which it passed; such company is not only bound to construct such new channel, but is also bound to keep it in a suitable and proper condition, so as not only to restore but to preserve the stream in its former usefulness as near as practicable.

APPEAL from judgment of Supreme Court.

In 1853 the Plaintiff's testator owned a farm in fee, situate in the town of Niagara, across which run a small stream of water, supplying water for stock, &c. The Defendants, a railroad corporation, having located its road through said farm, obtained from the testator a conveyance of the necessary land for its construction, and also the right of constructing its road through the adjoining farm, situate above the Plaintiff, owned by Voght.

In the construction of Defendants' road, it became necessary to make a deep cut in the channel of the stream, which would deprive the Plaintiff's testator of the use of the stream, by conveying the water into Niagara River, unless an artificial channel was constructed upon the lands of Voght. For this purpose, the Defendants acquired from Voght the right of constructing a new channel for the stream upon his land, and in the fall of 1854 made the channel and turned the stream into it, which conducted the water to the testator's farm in the same manner as before. During the ensuing winter the new channel was made upon the upper side of the said road, and parallel with the deep cutting therein through limestone rocks, and in

Railroads—Restoration of highway. 151 *N. Y.* 441; 92 *Hun,* 132 (72 *St. Rep.* 388; 36 *N. Y. Supp.* 866); 74 *N. Y.* 306; 84 *N. Y.* 250.

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the spring of 1855 the water commenced escaping from the new channel through the fissures in the rocks into the deep cutting of the railroad, and continued so to escape in such quantity as to deprive the Plaintiff, for a considerable portion of the year, of the entire water of the stream. It appeared upon the trial, that the new channel upon Voght's farm might have been repaired at a small expense, so as to prevent the escape of the water therefrom, and thus preserve the utility of the stream for the testator's farm. The Defendants totally neglected to repair the channel, and the testator in March, 1859, commenced this action to recover his damages for the diversion of the water. Upon the trial at Circuit, the Defendants' counsel requested the Court to charge the jury in substance, that if the Defendants made the new channel suitable and proper to preserve therein and conduct the stream of water upon the farm of the Plaintiff as it had before run, as far as could be discovered at the time, although the water should subsequently escape and be diverted from causes not discoverable at the time, or from other causes, such as fissures in the rocks, &c., caused by the elements subsequently, the Plaintiff could not recover. The Court refused so to charge, and Defendants' counsel excepted.

The Court in substance charged that the Defendants were bound to restore the stream as near as practicable to its former state of usefulness; and if it had not done so it was still its duty so to do, and that if the Plaintiff had sustained damage from a neglect of this duty, he was entitled to recover. The Defendants' counsel excepted to this portion of the charge. A verdict was rendered for the Plaintiff, upon which judgment was entered, which was affirmed upon appeal by the Supreme Court. Whereupon the Defendants appealed to this Court.

GROVER, J.—The exceptions to the refusal of the Court to charge as requested, and to the charge as given, fairly I think raise the question whether, if a railroad company in the construction of its road finds it necessary to change the channel of a stream, and thus divert its course, and for that purpose constructs a new channel, the company is bound to keep such

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new channel in a suitable and proper condition, so as not only to restore but preserve the stream in its former state of usefulness as near as practicable.

The 5th clause of Sec. 34 of the General Railroad Act (2 R. S. 681) among other things empowers railroad companies to construct their roads across, along, or upon any stream of water, watercourse, &c., which the route of their road shall intersect or touch, but requires such companies to restore the stream, or watercourse, to its former state, or to such a state as not unnecessarily to have impaired its usefulness. The position of the Defendants is that having construced the new channel with proper care, and in such a manner as that for the time being the stream is restored to its former state of usefulness, and for aught that can then be discovered, will permanetly so remain, the company is thereby relieved from all responsibility, although it should turn out from the nature of the soil or rocks through which such new channel is constructed, it in a few months permitted the escape of the entire water, and thus, as in the present case, an owner of land situate below the point where the new channel is constructed, is wholly deprived of the use of the stream. I am unable to assent to this position. It is insisted that it is a fair deduction from the doctrine of Billinger v. The N. Y. Central Railroad (23 N. Y. 42), and kindred cases.

The principle is that, when legal authority for interfering with a stream upon making compensation exists, the party interefering is not absolutely responsible for a consequential injury arising therefrom, but only where such injury is the result of negligence on his part. An examination of that case will show that although the apertures for discharge of the water through the embankment were properly constructed, and that due care was taken at the time to secure sufficient capacity for that purpose, yet if subsequent experience showed them deficient, the company was bound to make them suitable and proper for that purpose, and a neglect so to do would render them liable. The duty imposed upon the company in the presfulness as near as might be.

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ent case, was to restore the stream to its former state of use-

The company had the right to divert the stream, and construct the new channel therefor, if necessary for the construction of its road; and having the legal right to do this, were not responsible for the consequential injuries to others while the work was being done, if prosecuted with proper energy and dispatch. The change in the stream was made by the road for its own benefit. The plain intention of the statute in such a case is that the company shall restore the stream to its former proprietors as little impaired in its utility as practicable, so as to subject such owners to no loss or injury, or at any rate to make the loss as trifling as possible.

To effectuate this clear intent it must be held that the company must not only in the first instance make the channel as perfect as practicable, but continue and preserve it in that state as long as it continues to divert the water from its natural channel.

The testator had the right, as owner, to the continued, undiminished flow of the stream in its natural channel over his farm, and of this right he could not be deprived by the legislature without compensation. This right only includes the water flowing in the stream, and does not embrace any surface drainage that may flow into the Niagara River through the Defendants' cutting for their road.

This cutting the Defendants had a right to make, and for the flowing of surface drainage through it there is no liability.

The Defendants' counsel cites authorities showing that an owner digging in his soil, and thereby severing a vein of water running below the surface, and causing a spring upon the lands owned by another below, is not responsible for thus destroying the spring, for the reason that the digging being lawful, there is no liability for the consequences of the act.

That principle is not at all applicable to the present case. In this, but for the legislative permission for public purposes, the Defendant had no right, nor had Voght the power to grant to it any right to divert the stream from its natural channel to the prejudice of the testator. That permission is given,

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charged with the duty of restoring the stream to the testator as near as practicable to its former usefulness.

This is not by any means done if the testator has it restored burdened with the charge of keeping the new channel in repair.

That is a burden to which his previous enjoyment of the stream was not subject, which charge may exceed the whole value of the stream, and thus deprive the testator of his entire property therein. A construction leading to such a result must be rejected.

The judgment appealed from must be affirmed. All concur.

JOEL TIFFANY,
State Reporter.

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SARAH I. COOK, AN INFANT, &C., RESPONDENT, *v.* SAMUEL M. MEEKER & WILLIAM CONSELYEA, APPELLANTS.

Legacies—When payable—Interest and Income—Begin when.

Where a legacy is given with directions that interest and income be applied to use of legatee, the legatee is entitled to interest from death of testator.

J. H. Reynolds for Appellants.

S. C. Pinckney for Respondent.

DAVIES, CH.*J.*—The Appellants were constituted the executors of the last will and testament of Joseph Conselyea, deceased, and separate trustees of certain sums given in and by the will for the use of certain beneficiaries therein named.

By the fifth clause of his will the testator gave and bequeathed to his son William Conselyea, one of the Appellants, the sum of $5,000 upon trust to invest the same upon bond and mortgage, and apply the interest and income thereof to the use of his grandson Joseph Cook during his natural life.

Wills—Legacies—Payment—Time. 135 *N. Y.* 297 (47 *St. Rep.* 815).

Wills—Gift of income—From what time computed. 35 *Hun,* 41; 85 *Hun,* 421 (66 *St. Rep.* 206; 32 *N. Y. Supp.* 888); 60 *App. Div.* 444 (69 *N. Y. Supp.* 1040); 7 *App. Div.* 15 (40 *N. Y. Supp.* 495); 5 *Misc.* 130 (25 *N. Y. Supp.* 729); 19 *Misc.* 256 (44 *N. Y. Supp.* 224); 48 *Misc.* 432 (96 *N. Y. Supp.* 914); 41 *How.* 502; 52 *N. Y.* 370; 15 *Abb. N. C.* 478; 3 *Redf.* 334; 1 *Dem.* 494; 2 *Dem.* 255; 4 *Dem.* 381; 29 *St. Rep.* 198 (8 *N. Y. Supp.* 775); 37 *St. Rep.* 669 (14 *N. Y. Supp.* 194);

Legacies—Interest. 79 *N. Y.* 142; 96 *N. Y.* 511; 113 *N. Y.* 202 (22 *St. Rep.* 692); 124 *N. Y.* 530 (36 *St. Rep.* 686); 17 *Hun,* 341; 3 *Misc.* 185 (66 *N. Y. Supp.* 234); 2 *Redf.* 25, 438; 3*Dem.* 445; 2 *Con.* 382 (20 *N. Y. Supp.* 74); 2 *Con.* 554 (40 *St. Rep.* 119; 15 *N. Y. Supp.* 798); 32 *St. Rep.* 712 (10 *N. Y. Supp.* 861); 47 *St. Rep.* 815.

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By the sixth clause of the will, the testator gave and bequeathed to the Appellant Meeker, the sum of $3,000 upon trust to invest the same on bond and mortgage, and apply the interest and income thereof to the use of his granddaughter Anna Cook during her natural life. And by the seventh clause of the will the testator gave and bequeathed the further sum of $3,000 upon trust to invest the same on bond and mortgage, and apply the interest and income thereof to the use of his granddaughter Sarah Cook, the Plaintiff herein, during her natural life.

The testator declared in and by his will that in case any claim or demand should be presented and allowed against his estate in favor of Dr. Chauncey L. Cook, that the same should be paid ratably out of the principal of the several sums given andbequeathed to the said Conselyea and Meeker respectively, in trust for the use, benefit, and behoof of the children of the said Chauncey L. Cook. All the rest, residue, and remainder of his estate, real and personal, he gave to his son William Conseylea. He authorized and empowered his executors to pay and discharge the several legacies and bequests made in his will, or any or either of them, by transfering and delivering to the several legatees such bonds and mortgages belonging to his estate, to be selected by his executors, as might amount either severally of collectively to the legacy paid off.

In addition, the following facts were found by the Court which tried the case without a jury: That the testator died on the 10th of October, 1856, and that letters testamentary were issued to the Defendants on the 20th of December in that year. That the testator left bonds and mortgages amounting to the sum of $39,121, and that they were drawing interest at the time of the testator's death. That the amount of the legacies and bequests was $21,000 given by the will. That there were no debts against the estate except the demand of Dr. Cook, mentioned in the will. That the estate was ample to pay all legacies. That there was a large real and personal estate drawing interest. That the executors took possession and control of said

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estate from the time of the testator's death. That the lands and mortgages set apart for the payment of these bequests were part of the estate left by the said testator, and were drawing interest at and from the time of the testator's death. That on the 3d day of June, 1857, Dr. Cook presented to the executors a claim against the testator, duly verified, amounting to $426, which was afterward allowed by them, and paid to him on the 19th of December, 1857. That by the terms of the will three-sevenths of this claim, amounting to the sum of $116.18 was directed to be paid out of the principal sum of $3,000 bequeathed to the use of the Plaintiff.

That on the 19th of December, 1857, the Defendant Meeker received from the executors, for the use of the Plaintiff and her sister Ann for life, the sum of $5,767.64, of which $5,691 was in mortgages and $76.64 in cash.

The Plaintiff claimed the interest on said sum of $3,000 from the time of the death of the testator, and the Defendants insisted that she was only entitled to the interest and income thereof from the 19th day of December, 1857.

The Judge at Special Term held that the money bequeathed to the use of the Plaintiff was a legacy, and was not payable until the expiration of one year from the granting of letters testamentary, and that the Plaintiff was not entitled to interest therein prior to December 20, 1867. Judgment was entered dismissing the complaint, and an appeal to the General Term reversed the judgment and ordered a new trial. From this order the Defendants have appealed to this Court, and stipulated that if the order appealed from is affirmed, that judgment absolute shall be rendered against them.

There does not appear to be much difficulty in adjusting the rights of the parties, and the Defendants would have been held blameless if they had acquiesced in the judgment of the General Term of the Supreme Court, that the Plaintiff was entitled to the income of the same, set apart by the testator for her support and maintenance, from the time of the death of the testator. The amount in controversy hardly justified them in subjecting the Plaintiff, or the estate they represent, to the delay and expense of an appeal to this Court.

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A bare reading of the will shows that the testator had two classes of beneficiaries in his mind: one to whom he intended to give absolute legacies, and the other those for whose support and maintenance he intended to provide a fund, for which purpose the interest and income thereof were to be applied. In the former class was the bequest of the sum of $6,000 to his wife, the sum of $2,000 each to the two children of his son William, the sum of $3,000 each to his two grandchildren Anna L. Baker and Micajah R. Pinckney. In the latter class is the bequest of the sum of $4,000, the interest and income of which was to be paid to his wife during her natural life; the sum of $5,000, the interest and income of which was to be paid to his daughter married, during her natural life; the sum of $5,000, the interest and income of which was to be applied to the use of his grandson Joseph Cook during his natural life; the sum of $3,000, the interest and income of which was to be applied to the use of his granddaughter Anna Cook during her natural life; and the sum of $3,000, the interest and income of which was to be applied to the use of his granddaughter Sarah Cook, the Plaintiff, during her natural life.

By the provision of the Revised Statutes, no legacies are to be paid until after the expiration of one year from the time of granting letters testamentary, unless the same are directed by the will to be sooner paid (2 R. S. p. 90, § 43). This is an affirmance of the doctrine of the common law, and has not changed the rule as to the time when interest on legacies begins to run (3 Brad. Rep. 364).

At common law, the general rule is that interest upon a legacy is payable only at the expiration of a year from the testator's death (Toller on Ex. 324; Bradner *v.* Faulkner, 12 N. Y. R. 472). If, however, an *annuity* be given, or if by implication from the terms of the instrument the legacy be given for maintenance and support, it shall commence immediately from the death of the testator, and consequently the first payment shall be made at the expiration of the year next after that event (Toller on Ex. 324; Bradner *v.* Faulkner, *ubi supra;* 6 Vesey, 539; 6 Paige, 300). A learned author on the duties of execu-

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tors (2 Williams on Ex. 1288) says: This rule as to the payment of interest is subject to an exception, in case where the testator being a parent, or stands *in loco parentis* to the legatee: citing Acherly *v.* Vernon (1 P. Wms. 783); Hill *v.* Hill (3 V. & B. 183); Miles *v.* Robarts (1 Russ. & M. 555); Leslie *v.* Leslie (Cas. temp. Sugd. 4). Rogers *v.* Soutten (2 Keen, 508); Wilson *v.* Maddison (2 Y. & C. Ch. C. 372); Russell *v.* Dickson (Dr. & W. 133). For then, whether the legacy be vested or contingent, if the legatee be not an adult, interest on the legacy shall be assumed as a maintenance from the time of the death of the testator, if there is no other provision for that purpose (Harvey *v.* Harvey, 2 P. Wms. 21; Incledon *v.* Northcote, 3 Atk. 438; Chambers *v.* Goodwin, 11 Ves. 2; Brown *v.* Temperley, 3 Russ. Ch. Cases, 263); and even though the will should contain an express direction that the interest should accumulate (Mole *v.* Mole, 1 Dick. 310; M'Dermott *v.* Kealey, 3 Russ. Ch. Cases, 264, note; Wynch *v.* Wynch, 1 Cox, 433; Donovan *v.* Needham, 9 Beavan, 164; Rudge *v.* Winnall, 12 Beavan, 357; *In re* Rouse's estate, 9 Hare, 649). In Miles *v.* Robarts (*supra*) the testator gave legacies to be paid to two minor children provided they attained the age of twenty-one years, and the question was whether they were entitled to interest on their legacies of $10,000 each for their maintenance and education during their minorities; and he also gave a legacy to one George Francis Stuart, a minor, for his sole use and disposal provided he attains the age of twenty-one.

The Master of the Rolls said the testator appoints two gentlemen to be trustees and guardians of these children, and requests them to attend to their education; and the case of Branstrom *v.* Wilkinson is an authority directly in point, that they are entitled to the interest of the sums given to them until they attain the age of twenty-one, or die under that age. The same principles apply to the legacy to George Francis Stuart.

This is a strong case, showing the extent to which the Court of Chancery in England has carried the doctrine of applying the income or interest of a legacy payable at a future period, given to a minor for his maintenance and education, even be-

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fore the time arrives when the legacy is payable.

The weight of authority, undoubtedly, now is in favor of allowing the payment of annuities or incomes to commence at the testator's death. The Chancellor assumes this in Craig *v.* Craig (3 Barb. Ch. 76), referring to Gibson *v.* Bolt (7 Ves. 96); Fearnes *v.* Young (9 Ib. 553); Rebecca Owing's Case (1 Bland Ch. Rep. 296). The case of Angerstein *v.* Martin (Turn. & Russ. Rep. 232) came before Lord Eldon in 1823. The testator in that case devised his freehold estates to J. Angerstein for life, with remainder to his children in strict settlements; and as to his residuary personal estate he bequeathed the same to trustees, to be invested in the purchase of lands, to be settled in the same manner, with authority to invest the funds in stocks, &c., until the estates could be purchased, the interest or income to go to the same person or persons to whom the rents of the estate would go if the purchase had been made. The tenant for life filed his bill *within the year* after the testator's death, for the purpose of having the question decided whether he was entitled to the annual interest of the clear residue of the personal estate from the testator's death, or whether the amount of such interest for the first year was to form a part of the capital of the general residue, and which was to be added to the same, and invested; and, upon a review of all the previous cases, it was decided that the interest from the death of the testator belonged to the tenants for life, and was not to be added to the residue for the benefit of those who were entitled to the estates in remainder in the property to be purchased. And in the case of Hewitt *v.* Morris, which came before Lord Eldon a few months afterwards (Turn. & Russ. Rep. 241), the testator directed his executors to invest the residue of his estate, after payment of debts and legacies, in the funds or upon securities, the interest to be paid to A. for life, and after his death the principal to be held upon trust for his children.

The tenant for life was held to be entitled to interest accruing within the year next after the testator's death, upon funds in which the testaor's property stood invested at the time of his

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death, and which were not required for the payment of debts and legacies.

And it is to be observed that, in each of these cases, the interest and income were decreed to commence before the exact amount of principal fund was ascertained. See also Beckford *v.* Tobin (1 Ves. 308); Hill *v.* Hill (3 Vesey and Beames, 183).

Chancellor Walworth in Williamson *v.* Williamson (6 Paige, 304), after a citation and review of the authenticity, observes that "the result of the English cases appears to be, and I have not been able to find any in this country establishing a different principle, that in the bequest of a life estate in a residuary fund, and where no time is prescribed in the will for the commencement of the interest or the enjoyment of the use or income of such residue, the legatee is entitled to the interest or income of the clear residue, *as afterwards ascertained,* to be computed from the time of the death of the testator. All the cases which appear to conflict with this rule, except the two decided by Sir John Leach, which are no longer to be considered as authority, will be found to be cases in which the testator had directed one species of property to be converted into another, or the residue of any fund to be invested in a particular manner, and had then given a life estate in the funds as thus converted or invested. In such cases it appears to be consistent with the will of the testator to consider the life interest as commencing when the conversion takes place, or the investment is made, either within the year or at the expiration of that time. But as a year is considered a reasonable time for the executor to comply with the testator's directions as to the conversion or investment, the legatee for life cannot be kept out of the interest or income beyond that period. In the case made considerative, there is no direction for the investment thereof in any particular manner before the right of the widow to the use thereof for life was to commence; and as it appeared that a great portion of the personal estate was in bonds and mortgages and other securities, which were drawing interest at the death of the testator, there is no good reason for depriving the widow of the use of the residuary estate for an entire year." These remarks apply

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with peculiar force to the case now made considerative. There then is no direction for a conversion, but a direction in effect to transfer the bonds and mortgages of the testators, to the amount of the several bequests, in satisfaction of them. These securities were all bearing interest, and it is manifest that it was the intent of the testator that these several beneficiaries should have the interest and income of the amount separate for them, for their maintenance and education. And the fact that the precise amount of the funds was not ascertained until the expiration of a year from the death of the testator, furnishes no reason why the interest therein should not be paid to the beneficiary before that time. In re Williams (12 Legal Observer, 179) the Surrogate of Kings County allowed interest to an adopted daughter of the testator, on a sum of $5,000 directed to be invested, and the interests to be paid to her during life on the proportionate share of her legacy from the death of the testator, but he refused to allow interest from the same period to the widow of the testator, upon a legacy to be invested and the interest thereof paid to her. In the matter of Fish's estate (19 Abbt. Pr. Rep. 209), the Surrogate of New York in 1865 decided:

That annuities, or incomes, and interests upon sums directed to be invested upon trust to pay over interest or income, commence to run from the death of the testator.

The case of Hilyard estate (5 Watts & Sergt. 30) is quite in point. There the bequest was to the executors in trust to put at interest a certain sum, and apply the interest and income thereof to the sister of the testator. The court held that she was entitled to the interest upon the sum so held in trust during the first year from the death of the testator. It is a significant fact, that the statute laws of Pennsylvania, in relation to the payment of legacies, conform to that of this State directing their payment at the expiration of a year from the death of the testator. See, also, for the same doctrine, Eyre v. Golding (5 Binn., 472).

The authorities would seem abundant, therefore, to sustain the doctrine, that where a sum is left in trust, with a direction

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that the interest and income should be applied to the use of a person, such person is entitled to the interest thereof from the date of the testator's death. Especially is this so when, as in the will under consideration, it appears clearly to have been the intent of the testator that the legacy should be paid by a transfer of bonds and mortgages bearing interest at the time of his death. All the authorities and dicta concur, that under such circumstances the accruing interest upon the securities, from the time of the death of the testator, should go for the use and maintenance of the beneficiary. It follows from these considerations that the order of the General Term granting a new trial should be affirmed with costs, and in pursuance of the Defendants' stipulation, judgment absolute should be rendered for the Plaintiff, and the Supreme Court is directed to ascertain the amount due to the Plaintiff on the principles of this opinion, and render judgment therefor with costs.

Bockes, J.—At common law, when a legacy was given without specifying any time of payment, it vested in the legatee on the death of the testator, though not payable until one year afterward. The legacy vested on the decease of the testator, at which time the will was deemed to speak or take effect. By the Statute (2 R. S. 90, Sec. 43) legacies are not payable until after the expiration of one year from the time of granting letters, unless directed by the will to be sooner paid, and they will not draw interest until legally payable (12 N. Y. 472). Therefore interest is not payable on a legacy until a year from the granting of letters, unless it be otherwise directed in the will, either expressly or by fair implication. In this case no express direction is given but according to well-settled rules of construction direction is given by just and fair inference.

The testator gave to the Defendant Meeker three thousand dollars in trust, to invest the same on bond and mortgage, and to apply the interest and income thereof to the use of the Plaintiff during her life. The Plaintiff was a minor, and, so far as the case shows, was without other provision for her support and maintenance. The testator's personal estate exceeded the aggregate of all the legacies, and was well invested on bonds

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and mortgages drawing interest; and he gave authority to his executors to pay and discharge the legacies and bequests made in the will, by transferring and delivering bonds and mortgages belonging to his estate, to the legatees. Certainly there was nothing in the will, or in the circumstances surrounding the case, rendering it impossible or improbable that it was the intention of the testator that the legatee or beneficiary under the trust should not have the income from the fund named by him from the time of his decease. On the other hand, the inference is fair that he so intended. It is apparent that the bequest was intended for the support and maintenance of the Plaintiff, who was an infant, and there is no reason, nor is it probable, that he intended to postpone the benefit conferred for any period after his decease. In case of a legacy to a widow in lieu of dower, it draws interest from the death of the testator when he has made no other provision for her support during the first year after his death (6 Paige, 278); and so in the case of a legacy to a child whose support and maintenance are not otherwise provided for (1 Allen, 490). The construction claimed for this will by the Plaintiff is sustained by numerous authorities, both in England and this country (7 Vesey, 96; 9 Vesey, 553; 1 Bland's Ch. 296; 3 Barb. Ch. 76; 6 Paige, 298; 5 Watts & Sergt. 30).

The last case cited is much like the one in hand. The testator gave to his executors a sum in trust to be put at interest, and required them to apply the interest and income to the use of his sister during her natural life. It was held that she was entitled to interest on the sum from the death of the testator. So in Gibson v. Bott (7 Vesey, 96), the testator placed the residue of his property in trust, in the hands of his executors, and directed them to keep it invested, and to pay the interest and dividends to his two daughters and their assigns for life. It was held that they were entitled to the interest thereon from the testator's decease. The case under consideration is stronger in favor of the plaintiff's claim than are some of those cited, in which it was held that the beneficiary under the will was entitled to interest from the death of the testator. Here all or nearly all

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the circumstances exist and are combined, which in the cases cited were severally held to control the construction of the will and to indicate plainly the interest of the testator.

The estate was much more than sufficient to satisfy all the legacies.

It was well invested on bonds and mortgages drawing interest at the testator's decease. The executors were authorized to transfer existing securities in satisfaction of the legacies. One of the executors was made the trustee to take and hold the trust fund; thus no new or especial investment was necessary. The beneficiary was an infant with no other provision for her support, or means of support, so far as the case discloses. In view of these facts, and in accordance with well-settled rules of construction in analogous cases, it must be held that the Plaintiff is entitled to interest on the trust fund from the decease of the testator.

The order of the Supreme Court granting a new trial was right and must be affirmed; and under the stipulation judgment final must be rendered in favor of the Plaintiff.

The case, however, must go back to the Special Term for the purpose of fixing the amount for which judgment is to be entered.

GROVER, J. (dissenting).—The testator, owning a large real and personal estate, made his will in August, 1855, by which he gave to the Defendant three thousand dollars upon trust to invest the same upon bond and mortgage, and apply the interest and income thereof to the use of the Plaintiff, an infant, granddaughter of the testator, for life, and upon further trusts not material to the questions presented in the case. He further gave to said Defendant a like sum upon the same trusts in favor of an infant sister of the Plaintiff.

He further gave the sum of five thousand dollars to his son William Conselyea, upon similar trusts in favor of Joseph Cook, an infant brother of the Plaintiff. The will provided that in case Dr. Chauncey Cook, the father of the said children, should present any claim against the estate, and the same should

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be allowed, the sum so allowed should be paid ratably out of the principal given the children. The will further provided that any of the legacies thereby given might, at the election of the executors, be paid in bonds and mortgages belonging to the estate. The residue of the estate real and personal was given to the testator's son, William Conselyea. The whole amount of legacies given by the will was thirty-one thousand dollars.

The testator died in October, 1855, and the will was probated in December thereafter.

The testator left a large real and personal estate, thirty-nine thousand dollars of the latter consisting of bonds and mortgages upon real estate drawing interest at the time of his death. There were no debts against the testator at the time of his death, except a demand for about four hundred and sixty dollars, which was presented by Doctor Cook, the father of the children, and allowed and paid by the executors, which, according to the will, was deducted from the principal given for the benefit of his children. At the expiration of a year from the probate of the will the Defendants, who were executors, paid over to Defendant Meeker as trustee, the amount which according to the will was to be invested for the benefit of the Plaintiff and her sister, principally in bonds and mortgages belonging to the testator at the time of his death, but no interest. The Defendant Meeker, before the commencement of the suit, had received sixty-two dollars interest upon the sum paid him by the executor, one-half of which belonged to the Plaintiff, which he had offered to pay to her guardian, which the latter declined to receive unless interest from the time of the death was also paid, which the Defendant Meeker refused to pay. For the collection of the latter interest an action was brought by the Plaintiff in the Supreme Court. Upon the trial at the Special Term the Court held that the money was not payable to the Defendant as trustee until a year after the death of the tesator, and that the Plaintiff was not entitled to interest for that time, to which conclusions of law the Plaintiff excepted.

Judgment dismissing the complaint was rendered, which, upon appeal, was reversed, and a new trial ordered by the Gen-

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eral Term, from which judgment the Defendants appealed to this Court.

The only question arising upon this appeal is, whether the Plaintiff was entitled to interest upon the sum to be invested for her benefit from the time of the death of the testator, or not until a year after the probate of the will. Sec. 43, page 90, second Revised Statutes, provides that no legacies shall be paid by any executor or administrator until after the expiration of one year from the time of granting letters testamentary, or of administration, unless the same are directed by the will to be sooner paid. There is no such direction found in the will of the testator, unless it is to be inferred from the discretion given to the executors to pay the same in bonds and mortgages belonging to the estate, or from the fact that such bonds and mortgages were drawing interest at the death of the testator, or from both of these facts. It is clear that such direction cannot be inferred from the discretion given to the executors as to the manner of payment. They were left at liberty to make payment in cash or mortgages; and it would be absurd to hold that if they chose to pay cash they were entitled to the year, but if they elected to pay in mortgages such payment must be made immediately. Neither can such direction be inferred from the fact that the assets were drawing interest at the death of the testator. Such must be the condition of a portion, at least, of the assets of all large estates. In some form an income is produced by the property, or a large portion of it, and yet in no case has this been considered as entitling a legatee to interest until the lapse of a year from the probate of the will. It furnishes no ground for presuming an intention of the testator that the legacies should be sooner paid than would the part of a surplus remaining after payment of all debts and legacies; indeed, the latter part would have a greater tendency to create such presumption than the former, where the estate was insufficient for those purposes. It is clear that if the bequest in the present case is to be regarded as a legacy, the Plaintiff is not entitled to interest until the expiration of a year from the probate of the will. This was the conclusion of the learned Court

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below. It was held by that Court that this, so far as the Plaintiff's right to interest is concerned, must be regarded in the nature of an annuity or income. It has always been the rule that an annuity or yearly income given by will should commence (when no time was fixed by the will) from the death of the testator. It is unnecessary to cite authorities for so plain a proposition. The inquiry, then, is, whether this bequest is to be regarded as an annuity or income, or as a legacy; if the former, the Plaintiff is entitled to interest from the death of the testator; if the latter, she is only so entitled after one year from the probate of the will. In the absence of authority, I should deem it clear that it was a legacy. It is given to Meeker in trust for certain purposes; among other things, to invest and pay the interest for the use of the Plaintiff for life. Had it been given to Meeker absolutely, there would have been no question but that it was a legacy to him, payable like other legacies. How does the bequest become enlarged by the trusts charged upon it in his hands? Had there been no such charge, he would have been entitled to the money in one year from the probate of the will, and if not then paid, to interest from that time. But it is claimed that the trust imposed (to invest and pay the interest to the Plaintiff for life) charges the bequest with interest from the death of the testator. I am unable to see the force of the argument, that what Meeker is bound to do with the money when received—whether to invest and pay the interest to the Plaintiff for life, and then pay the principal to her issue, or whether to pay principal to Plaintiff upon the happening of any subsequent event, and interest until that time —can have to do with the amount of money he is entitled to receive under the will. But it is claimed that the question has been settled in favor of the Plaintiff by the judgment of Courts to an extent that should be deemed controlling by this Court. It is conceded that there has been no such determination by the Courts of this State. Craig *v.* Craig (3 Barb. Ch.), only determines that an annuity shall commence at the death of the testator. This has nothing to do with the question in the present case; that is, whether the bequest is a legacy or not. The

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case of Hilyard's Estate (5 Sergt. & Watts, 30), decided by the Supreme Court of Pennsylvania, is a direct authority in favor of the Plaintiff. It was there held, under a statute substantially like the statute in this case, that where money was given to executors in trust to invest and pay the interest to another, that the sum drew interest from the death of the testator. The decision was based partly upon the ground that the assets were drawing interest at the death of the testator, and partly upon the analogy to annuities which commenced from the death of the testator. I am unable to assent to the reasoning of the learned Court upon either ground. I have before examined the effect to be given to the fact that the assets were drawing interest at the death of the testator, and arrived at the conclusion that it was entitled to no weight; neither do I perceive any analogy in such case to an annuity. The money is given upon trust to invest and pay the interest to the Plaintiff, whether for a longer or a shorter time is immaterial, and then apply the principal as directed. It is a legacy and nothing else. The diminution of the principal given. in consequence of the demand presented by Doctor Cook, I do not regard as material. If the bequest of a sum certain upon trust, as in the present case, should draw interest from the death, I am unable to perceive why a like bequest of an uncertain sum should not, when reduced to a certainty, be entitled to like interest.

There was no exception taken to the dismissal of the complaint, or request made to render judgment in favor of the Plaintiff for the small balance of interest received by the Defendant Meeker, to which the Plaintiff is entitled. No such question can be considered in this Court.

The judgment of the General Term must be reversed, and that of the Special Term affirmed.

All concur in opinion of DAVIES and BOCKES except GROVER, J., who dissented, and PORTER, J., who having been of counsel takes no part.

Judgment affirmed.

JOEL TIFFANY,
State Reporter.

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WILLIAM B. RENWICK, ET AL., ADMRS., &C., OF ROBERT RENWICK, DECEASED, RESPTS., v. THE NEW YORK CENTRAL RAILROAD COMPANY, APPTS.

Negligence—Railroad Crossing—No Signal.

If, on approaching a crossing by a train of cars, no signal be given, as the ringing of the bell or the blowing of the whistle, by the agents or servants of the company, it is guilty of negligence; and where there is conflicting evidence on that point, the question is to be submitted to the jury; and their finding therein is conclusive.

PARKER J.—Upon the question of the Defendants' negligence in this case, it is impossible to maintain that there was no conflicting evidence. If no signal was given, from the train, of its approach to the crossing where the injury occured, either by the ringing of the bell or the sounding of the whistle, the Defendants are chargeable with negligence.

Now, upon the question whether the bell was rung or not, it is undeniably true that considerable evidence was given on both sides. On the part of the Plaintiff, both he and his daughter swore that they listened for the train as they approached the crossing, and did not hear it. Several witnesses upon the train testified that they heard no bell or whistle before the whistle for the brakes at the crossing.

Mrs. Thomas, whose house the train passed about fourteen rods before it reached the crossing, swore that there was no signal either from the bell or whistle; and Mrs. Admas, who was observing the train from the same house, heard none. Sacket who was at his house, three-quaters of a mile east of the crossing, and one hundred rods from the track, heard the train,

Railroads—Crossings—Negligence—Signals. 39 *N. Y.* 365; 64 *N. Y.* 538; 45 *Hun,* 573 (10 *St. Rep.* 643; 27 *Week. Dig.* 351); 6 *Rob.* 101; 5 *Daly,* 84; 14 *Daly,* 222 (6 *St. Rep.* 362; 19 *Abb. N. C.* 18).

Contributory negligence—Question of law or fact. 37 *N. Y.* 574; 79 *N. Y.* 469; 6 *Hun,* 465; 15 *Hun,* 500; 14 *Abb. N. S.* 33; 55 *App. Div.* 28 (66 *N. Y. Supp.* 1076); 7 *Lans.* 14.

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but heard no bell or whistle, until the whistle for the brakes. Now, though most of this is negative evidence, and the Defendants have on their side the positive testimony of four witnesses that the bell was rung, still, as some of the Plaintiff's witnesses were in a condition to hear it if it had been rung, and were giving their attention to the train, the fact that they did not hear it, is evidence conducting to prove that it was not rung. Two of the Defendant's witnesses who swear that it was rung, are the engineer and fireman, who were in fault if it was not rung; the character of another was impeached. The conflict raises a question of fact, which the Plaintiff had the right to have determined by the jury.

There can be no pretence that the Plaintiff was so clearly guilty of negligence himself as to require the Court to nonsuit. His own testimony, and that of his daughter, show the exercise of all the prudence which the circumstances required. He stopped and looked and listened from four to six rods from the track, and hearing no signal nor indication that the train was apyroaching, started his horses, and kept looking to the right and left for the cars until he reached the track, and then, turning his eye to the right, found them upon him.

The train was behind time, and, as we must conclude for the purposes of this question, giving no signal of its approach. Although, if the Plaintiff had stopped at a point nearer the track, he might have seen the train, his not doing so is not necessarily negligence. The thorough discussion of this question of negligence by this Court in the case of Ernst v. Hudson River R. R. Co. (32 How. 61), renders unnecessary any further discussion of it here. Without an utter disregard of the doctrines of that case, it is impossible to hold that the Plaintiff in this case should have been nonsuited. Upon the question of the Defendants' negligence, to show that there was an omission of the requisite signal, Levi Yorks was called as a witness. He testified that he was a passenger on the train, that he heard the whistle to "down breaks," but did not hear any long whistle, nor any bell. He was then asked by the Plaintiff's counsel, "Could you have heard the sound of the whistle or bell if one had been blown or

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rung?" This was objected to by Plaintiff's counsel as incompetent, but was allowed and Defendants excepted. The witness answered: "I rather think I could have heard it."

Although it seems to me that this evidence was erroneously admitted, as involving the opinion of the witness upon a question which belonged to the jury to decide, my associates think the question should be construed as merely asking whether the witness was so situated that he could have heard, and in that view admissible.

The exception to the refusal to charge as requested, "that if the Plaintiff could not see an approaching train from the east until near the crossing, and not in time to avoid the danger when he was within four to six rods from the track, it was his duty to stop nearer the track, if by so doing he might have seen the approach of the train in time to have avoided the danger; and his omission to do this was negligence," was not well taken. (Ernst *v.* Hudson River R. R. Co., *supra,* and cases there cited.)

The judgment should be affirmed.

All concur. Affirmed.

JOEL TIFFANY,
State Reporter.

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MYLES SHERIDAN, ADM., *v.* THE BROOKLYN CITY AND NEWTOWN RAILROAD COMPANY.

Negligence—Railroad Company—Front Platform—Minor.

It is negligence on the part of a railroad company to so overcrowd their car as to compel a passenger to stand on the front platform, from which he was thrown and fatally injured.

It is not error for the Court to refuse to charge that the company owed no more protection or care to a boy of nine years of age than to an adult.

THIS was an action under the statute brought by the Plaintiff as administrator of Dennis Sheridan, deceased, to recover damages for the wrongful acts of the Defendants, which resulted in the death of the deceased. The Plaintiff recovered at the Circuit, and the judgment was affirmed at the General Term of the second district. The facts are more fully stated in the opinion of the Court.

Negligence—Proximate cause—Liability. 38 *N. Y.* 262; 60 *N. Y.* 335; 77 *N. Y.* 54; 83 *N. Y.* 621; 86 *N. Y.* 413; 178 *N. Y.* 121; *D.* 178 *N. Y.* 124; 9 *Hun,* 519; 13 *Hun,* 88; 29 *Hun,* 114; 64 *App. Div.* 488 (72 *N. Y. Supp.* 252); 71 *App. Div.* 444 (75 *N. Y. Supp.* 869); 79 *App. Div.* 124 (80 *N. Y. Supp.* 116); 79 *App. Div.* 126 (80 *N. Y. Supp.* 117); 20 *Misc.* 34 (45 *N. Y. Supp.* 324); 65 *Barb.* 154; 46 *Super. Ct.* 90.

Negligence—Question of fact. 37 *N. Y.* 534; 38 *N. Y.* 353; 38 *N. Y.* 449; 130 *N. Y.* 212 (41 *St. Rep.* 303); 91 *Hun,* 87 (71 *St. Rep.* 103; 36 *N. Y. Supp.* 167); 6 *Rob.* 297; 51 *Super. Ct.* 31.

Contributory negligence. 42 *N. Y.* 361; 3 *Abb. Ct. App. Dec.* 277; 1 *Sweeny,* 302; 15 *Daly,* 379 (27 *St. Rep.* 801; 7 *N. Y. Supp.* 666).

Nonsuit—Inference most favorable to plaintiff. 165 *N. Y.* 425.

Railroads—Riding on platform. 7 *App. Div.* 315 (40 *N. Y. Supp.* 995); 11 *Abb. N. S.* 414; 113 *App. Div.* 724 (99 *N. Y. Supp.* 266); 65 *Barb.* 100; 39 *How. Pr.* 420; 42 *Barb.* 292; 33 *Super.* 396; 47 *Super. Ct.* 465.

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A. J. Parker for the Appellant.
James Emott for the Respondents.

HUNT, J.—This is an action by the administrator of a boy nine years of age, against the Defendants, a company running a horse railroad in Brooklyn, for causing the death of the boy by the negligence and misconduct of the Defendants.

On the 15th of September, 1864, the deceased having paid his fare, was seated with a companion of his own age in the interior of a car of the Defendants. The car began to fill up with passengers, and the conductor ordered the boys to get up and make room for adult passengers. They went forward in the car, and took other seats, and were again ordered up, and, objecting to give up their seats, were "put out" of their places by the conductor.

The car had by this time become very full, "very crowded." The deceased was crowded and pushed by the passengers in the car out on the front platform, which, as well as the inside of the car, was full of people.

While there, the car being in motion, there was a rush of another passenger to get off, and the deceased was thrown off the car, was run over, and received injuries from which he died. At the close of the evidence the Defendants moved for a nonsuit. The Court denied the motion, and the Defendants excepted. Upon the facts there was a conflict of evidence, and the jury by their verdict adopted the view claimed by the Plaintiff on the trial, and we are to take the same view on this appeal. It is this view which I have given above.

The Defendants insist that the motion for a nonsuit should have been granted, urging that there was negligence on the part of the deceased in occupying a position upon the platform, and that the Defendants were no more responsible than if the boy had been shot with a revolver, or struck with a club, by a fellow passenger. The question of the negligence of the deceased, in remaining upon the platform, was submitted to the jury, under the instructions hereafter to be considered. For the present we are to assume that the deceased was upon the platform, by the express requirement of the Defendants and

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against his own remonstrances, properly so far as the Defendants are concerned. If, by the motion of the car, he had been thrown from this dangerous position, or by the continued pressure of the large crowd which the Defendants had permitted upon their cars, he had been pushed from his standing place, the Defendants would have been liable. It does not alter this liability that the wrong of a third party concurred with their own in producing the injury. It may well be that the young man was not justified in rushing through the crowd and in aiding in throwing the deceased from the cars; but this does not relieve the Defendants' wrong. If they had not removed the deceased from his seat, and compelled him to stand upon the platform, he would have been unaffected by this illegal act of the young man. It was his violence, concurring with the Defendants' illegal conduct, in overcrowding their car, and in placing the deceased upon the platform, that produced the disastrous result. It is no justification for the Defendants that another party, a stranger, was also in the wrong.

Upon the evidence, the jury would also have been justified in finding the Defendants guilty of negligence in that the car was not stopped, when the strap was pulled for that purpose. On this branch of the case or on the other, there was no conflicting evidence. There was testimony on which the jury might have found, that the bell was wrong twice before the young man reached the platform, and that the driver should have stopped the car. It was quite clear that if the car had been stopped, the accident could not have happened to the deceased in its full extent, as it appears that he was run over by the rear trucks, and there received the injury which resulted in his death. On both branches of the case, it was the duty of the Court to leave the question of negligence to the jury, and there was no error in denying the motion for a nonsuit.

At the close of the evidence, the Defendants' counsel requested the court to charge the following propositions:

First. That the fact that the deceased was a child, makes no difference in the application of the rule of law as to the ques-

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tion of negligence. If not of years of discretion, he should have a protector.

Second. The evidence showing that the deceased was knocked off the car while the car was in motion, and that none of the Defendants' servants contributed to the act, the Plaintiff cannot recover in this action.

Third. That the deceased was in fault in going on to the front platform; and although the Defendants may have been guilty of negligence, yet when each party is guilty there can be no recovery.

The Court declined to charge otherwise than is set forth, to which Defendants excepted.

The second and third of their requests do not require much consideration.

Each of them is open to the objection of assuming as matter of fact what is not such, and what the jury found to be otherwise. Thus, the second proposition assumes that none of the Defendants' servants contributed to the deceased being knocked from the car, and the third assumes that the deceased was in fault in going upon the platform.

The jury having found that it was the very act of the conductor, in placing him upon the platform, that produced the result, and that he was not in fault at being there, if the second proposition was intended to be limited to the immediate act of throwing the deceased from the car, it was not sound in any respect.

The Defendants cannot claim more seriously that there was error in refusing to charge the proposition first requested, to wit: "That the fact that the deceased was a child makes no difference in the application of the rule of law as to the question of negligence; if not of years of discretion, he should have a protector." The question of negligence, as here set forth, arises upon the conduct of the deceased in taking care of himself, and also upon the conduct of the Defendants in regard to the deceased. In the latter view, the rule asked for would not have been correct. A sick or aged person, a delicate woman, a lame man, or a child, is entitled to more attention and care

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from a railroad company than one in good health and under no disability. They are entitled to more time in which to get on or off the cars; they are entitled to more consideration when crossing a street to the end that the cars shall not run over them. All of these classes are entitled to use the streets and to ride in the cars, and such haste in starting up, or such speed in driving as would be reasonable care toward others, might well be carelessness and neglect toward them.

The proposition in question also embraces the degree of care necessary to be used by the deceased in taking care of himself. It embraces too much in any aspect, when it requested a charge as matter of law, that "if not of years of discretion he should have had a protector." This would be a rule quite too rigid. There was no pretence that this boy was so young as to require a protector. The Court did charge, that if the jury were of opinion that the lad was negligent in any way, and his negligence contributed to the injury, the Plaintiff could not recover; but if there was no negligence on the part of the boy, and there was on the part of the Company, then he could recover. The rule of law was laid down generally, and the deceased, although a lad only, was required to conform to the standard—no exception or discrimination was made in favor of youth. It was not the province of the Court to say whether what the boy actually did, or omitted, constituted negligence—that was for the jury exclusively.

The Court could only submit the general question of negligence to the jury, with instructions as to the law applicable to it.

No one, whether sick, lame, imbecile, or vigorous and youthful, is bound to exercise all the skill and all the care that the most capable and ready-witted person could command. Ordinary capacity, and ordinary care and attention in protecting themselves, is all that the law requires. This each is bound to give, whatever his age or condition; and if he fails, he cannot call upon others to supply his deficiencies, or to compensate him for losses arising from its absence.

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For the general principles that I have laid down, see Ernst *v.* The Hudson R. R. Co., 35 N. Y.; Willis *v.* L. I. R. R. Co., 32 Barb. 398; affirmed in Court of Appeals, 34 N. Y. Rep. 670; Beisiegel *v.* N. Y. Central R. R. Co., 34 N. Y. 622.

I think the case was correctly tried, and that the judgment below should be affirmed.

All concur. Reversed.

JOEL TIFFANY,
State Reporter.

ALEXANDER S. DIVEN, RECEIVER OF THE YATES COUNTY BANK, *v.* ELIZABETH LEE, EXECUTRIX, AND ALFRED LEE AND THOMAS LEE, EXECUTORS OF THE LAST WILL OF BENJAMIN LEE, DECEASED.

Executor—Invalid Judgment—Accounting—Laws 1849, *ch.* 226.

In an action by a judgment creditor, seeking to compel an executor to account before a Surrogate, with a view to enforce the collection of a judgment obtained under the Act of 1849 (ch. 226), seeking to enforce the responsibility of Stockholders of Banks, &c., the right of such creditor to maintain such proceeding before the Surrogate depends upon the validity of the judgment under which he claims.

Where it appears from the record of such judgment, that the facts necessary to give the Court jurisdiction had not been found, the ascertainment of which was a condition precedent to the rendering of such judgment, the judgment itself must be deemed invalid, and the supposed rights of the creditor under it cannot be maintained.

APPEAL from an order of the Supreme Court rendered at General Term in the fifth district, affirming an order of the Surrogate of Onondaga County dismissing proceedings instituted by the Plaintiff to compel the Defendants to account as executrix and executors of the will of Thomas Lee, deceased.

The facts sufficiently appear in the opinion.

SCRUGHAM, J.—The Appellant claimed the right as a creditor of the estate of Benjamin Lee, deceased, to compel the

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Respondents, as executrix and executors of his will, to account before the Surrogate of Onondaga County.

His character as such creditor depended upon the validity of the judgment which he had obtained in proceedings to enforce the responsibility of the stockholders of the Yates County Bank,, under the Act of 1849 (chap. 226).

The stock from the holding of which the alleged responsibility arose, did not form part of the estate which was left by Benjamin Lee at his death, as the bank was not then in existence, nor did his will contain any direction or authority to the executors to invest any of the funds of the estate in such securities, and it is not pretended that the invest ment was such as executors are authorized to make by law.

The stock could not, therefore, be properly considered the property of the estate, but rather that of the executors individually; and they, and not the estate, were responsible as stockholders.

Nevertheless, the judgment under which the Appellant claimed, declared Benjamin Lee to have been a stockholder in the bank, and directed the collection of $5,000 out of the assets in the hands of his executors, and the Surrogate was bound to regard it as valid, unless it appeared that the Court in making it acted without jurisdiction.

The proceedings under this act are of an anomalous character, and one only applicable to the particular business indicated in the act, to wit: the winding up of the affairs of banks of issue when default shall be made by them in the payment of any debt or liability contracted after the 1st of January, 1850, and the enforcement of the responsibility of their stockholders.

The means prescribed for acquiring jurisdiction over the persons of the stockholders are unknown to the common law, and quite different from those required in actions under the Code. Personal service of notice is not required in any code, and mere advertisement is sufficient as to all stockholders who do not reside in the county where the principal office of the corporation is situated.

Such a method of requiring jurisdiction may be justified in

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the case of a stockholder, by the supposition that from his connection with the bank, and his interest in proceedings affecting it, he would be likely to hear of a fact so notorious as that its affiairs had passed into the hands of a receiver, and therefore that a notice left at his house, or published in a newspaper, would be efficient to give him knowledge of proceedings being taken to enforce his responsibility.

The entire inefficiency of such a method as to persons who are not so interested, and the limited object of the act as shown by its title and provisions, clearly indicate that the proceedings are to be confined to stockholders; and that in it the Court is not to exercise jurisdiction over any who do not come within the definition of that term given in the 2d section of the act.

A careful reading of sections 17, 18, 19, and 20, will show that the jurisdiction of the Court to give judgment in the proceedings depends upon the ascertainment, in the manner provided by the act, of the fact that the person against whom it is given is a stockholder.

If evidence is offered to establish the fact, and the Court passing upon it decide the question, the decision, though erroneous, will not render the subsequent judgment void, but only voidable; and the judgment will be conclusive until set aside or reversed by the Court which granted it, or by some other Court having appellate jurisdiction.

But if, on the contrary, no proof whatever is offered of the fact, and it is not ascertained as provided by the act, the Court in proceeding to render judgment undertakes to dispense with a condition precedent upon which alone its right to give judgment in proceedings under this act is founded, and its act will be void. Gallatin *v.* Cunningham, 8 Cowen, 370.

The record which was produced before the Surrogate does not show that any evidence was offered to establish the responsibility of the estate of Benjamin Lee, deceased, as a stockholder of the bank, or that it was ascertained in any manner that his estate was chargeable as such, according to the rules and principles declared in the act.

The report of the referee, whose duty it was among other

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thing, to ascertain the persons who were chargeable as stockholders, was not in any manner modified or amended by the Court, but was in all things ratified and confirmed, and it does not state that the estate is responsible, but that the executors are, individually.

The language of the report in this respect is as follows: "And I do hereby, in pursuance, &c., find, decide, and report, that the several persons whose names are embraced in the list of stockholders assessed in Schedule E, hereto annexed and forming a part of this report, and to which I respectfully refer, are the stockholders of the said President, Directors, and Company of the Yates County Bank, who are responsible individually to the entire amount of the stock held by them for the debts, &c.;" and the entry in the schedule is as follows: "Elizabeth Lee, Alfred Lee, and Thomas Lee, executors, &c., of Benjamin Lee, deceased."

In view of the fact that the act intends a discrimination in all cases where trust funds are invested in the stock, providing that the trustee shall be regarded as a stockholder, and individually responsible in case the investment shall have been made by him voluntarily, and expressly declaring that no trust funds in his hands shall be in any way liable under the provisions of the act by reason of any such investments; it cannot be successfully contended that this report alleged the responsibility of the estate, or that its language is capable of any fair construction other than as a declaration of the individual responsibility of the executors, and that they are individually chargeable as stockholders. This being so, the Court was authorized upon the coming in of the report to make an order of confirmation, which should be final as a judgment against the executors individually.

It was not, however, concluded by the report, but the Justice holding the Special Term might hear the allegations of the parties and persons interested, and modify or amend the report, and afterward at Special Term confirm it as so amended.

In this proceeding it might doubtless be ascertained that the estate was chargeable, and not the executors individually, as

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alleged in the report, and then the order of confirmation might properly contain a direction that the sum charged in the apportionment against the executors, should be collected out of the assets in their hands as such.

As the Court, in which the proceeding is taken, is a Court of general jurisdiction, it is to be presumed that it acted within its jurisdiction in granting the judgment which it gave, unless the contrary appear; and it may be that the Surrogate would have been required to presume that the referee's report had been amended before confirmation, in such manner as to justify the judgment, if such presumption were consistent with the declaration of the order of confirmation, in which the judgment is announced; but such presumption is entirely inadmissible in presence of the most important declaration of the order, that the referee's report is in all things ratified and confirmed.

It appeared, therefore, from the record itself, that it had not been ascertained that the estate was chargeable at the time the judgment was rendered; and as the ascertainment of that fact is a condition precedent to the judgment, directing that the amount charged against the executors on the apportionment should be collected out of the assets in their hands as such, the Court, in giving that judgment, acted without authority.

The order should be affirmed.

Judges PORTER, PARKER, GROVER, and DAVIES, Ch.J., concurred.

Judges HUNT, WRIGHT, and BOCKES, were for reversal.

Order affirmed.

JOEL TIFFANY,
State Reporter.

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ANN CURRAN, ADMINISTRATRIX, v. THE WARREN CHEMICAL AND MANUFACTURING CO.

Evidence—Negligence—Railroad Company.

In an action for negligently causing the death of a person, the burden of establishing the negligent causing of the death is upon the plaintiff; and it is error for the Judge to charge the jury, if the death of the party occur on defendants' premises while defendants are in exclusive occupation thereof, that, as a matter of law, the defendants are liable, unless they can explain the cause of such death.

BOCKES, J.—This action was brought by the Plaintiff as administratrix, under the Act of 1847, and its amendments, which gives compensation in case of the death of a person occasioned "by wrongful act, neglect, or default."

The Defendants, a Manufacturing Company, were engaged in the distillation of coal-tar, and in the manufacture of chemical oils, as benze, benzine and naphtha.

The deceased, a son of the Plaintiff, was a boiler-maker in the employ of a firm engaged in the construction and reparation of boilers, and was sent by his employers to the Defendants' manufactory to repair their boiler. To prosecute the work it was necessary to labor on the inner surface by the light of lamps, entering through an orifice opened for the purpose.

On the day of the disaster, the deceased labored as he had done for several previous days, until twelve o-clock, then went to his dinner, from which he returned in about a half hour, entered the boiler, and fell dead almost instantly, in consequence of inhaling foul and poisonous gas, which had accumulated during his absence. It does not distinctly appear where and how the foul gas had its origin. On this point the parties supported different theories from the evidence. On the part of the Plaintiff it was insisted that it was generated in the adjoining still—the entire works comprising six—and escaped into the boiler where the deceased labored, through some imperfection in the works, or by reason of inattention and want of care in the Defendants' agents and servants in permitting this result.

Negligence—Contributory. 42 *N. Y.* 361; 6 *Rob.* 302.

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On the part of the Defendants it was maintained, that the gas was generated in the boiler itself, by reason of the combustion of the lamp, and the respiration of the laborers therein; and further that, wherever it had its origin, the deceased himself contributed to the danger and actually caused the catastrophe, by closing or directing the closing of the ventilator attached to the boiler, and which operated as a safety-valve for the escape of noxious gases.

There was no dispute but that there was such ventilator, and that safety to the laborers within the boiler required it to be generally, if not at all times, open while the work was progressing; nor is there any dispute but that the deceased, in the forenoon of the day of the disaster, directed and caused it to be closed.

In this view of the case, and in my judgment none other can fairly be taken, the learned Judge should have nonsuited the Plaintiff at the close of the evidence, as he was requested to do, for on the conceded or undisputed facts it stood established that the deceased, by his own careless, negligent, and wrongful act, contributed to the cause which produced his death. It seems plain beyond peradventure that the closing of the ventilator prevented in a very great degree the escape and diffusion of the noxious vapor, and caused it to accumulate; and its unusual collection and concentration thus produced was the immediate cause of the injury complained of.

But if it be admitted that a case was made for the consideration of the jury, then it was submitted to them in one respect upon a wrong theory. The general tone of the charge was undoubtedly correct. The jury were instructed that they were to consider the ordinary hazards and risks of the employment, whatever they were, as having been voluntarily assumed by the deceased; that when a man engages in a dangerous enterprise, he accepts its ordinary risks, and is bound to forsee and submit to the consequences which usually attend it. They were also corectly instructed, that in order to recover, the Plaintiff was bound to show that the deceased came to his death without fault on his part and through the negligence, carelessness, or

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wrongful act of the Defendants, their agents or sevants. But they were also told that, under the facts proved in this case, the Defendants must explain how this man came to his death; that, since the Plaintiff had shown that the deceased was killed on the Defendants' premises, in their factory, under their exclusive control, the burden of proof was cast upon the Defendants to explain how that death came, and that they must satisfy them (the jury) that it was caused without any fault on their part, or be responsible in damages. It was also charged that, inasmuch as the death occurred on the Defendants' place, where they were in the exclusive occupation and control of it, as matter of law the Defendants were liable, unless they could explain the cause; that, when a man has been killed or has died on the premises of a party charged with a wrong in that regard, without assignable reason for it that can be seen, such person is bound, in order to dischage himself from liability, to show that he is not to blame for such death. And again the Judge remarked, "Now, upon that question" (the question how deceased came to his death), "the burden of proof, as I have told you, is with the Defendants, to show how this man came to his death, *because it took place on their premises;*" and it is added, "it is not necessary, as I can see, for the Plaintiff to show you the precise manner or theory of his death." There are other paragraphs in the charge of similar import. These instructions were obviously erroneous. The mere fact that an injury or death on the premises of a party, in his possession and under his control, raises no presumption of wrong against such party. The circumstances under which the injury occured must still be proved, showing a wrongful act or omission of some duty on the part of the person sought to be charged, in order to establish a liability. The simple happening of an injury on one's premises raises no presumption of wrong on his part any more than would the happening of an injury in his presence or under his observation. The burden of proof in all cases of negligence is on the Plaintiff.

It was held in Holbrook and wife *v.* The Utica and Schenectady R. R. Co. (12 N. Y. 236), that when a passenger on a

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railroad is injured, the burden of proving that the injury was caused by the negligence of the company or its servants, rests upon the party seeking to recover damages therefor; and that the mere fact that a person is injured while riding in a railroad-car, does not impose upon the company the burden of disproving negligence. Judge Ruggles properly remarks, the presumption arises from *the cause* of the injury, or from other circumstances attending it, and not from the injury itself. So, in the case under examination, if indeed it was a proper one for them, the jury should have been directed to examine into the cause of the death, with a view of determining the Defendants' liability, instead of starting with a presumption of wrong, from the fact that the deceased died on the Defendants' premises. The charge of the Judge was manifestly wrong in a very essential particular. It cast the burden of proof where it did not belong, and permitted the jury to hold the Defendants to a liability not warranted by the facts on which it was supposed to rest.

The order of the General Term, reversing the judgment and granting a new trial, was clearly right, and should be affirmed. The Defendants are also entitled to judgment absolute in their favor, according to the stipulation.

DAVIES, HUNT, SCRUGHAM, PARKER, and GROVER concurred in the conclusion arrived at on the last point discussed in the opinion.

PORTER, J., was for renewal. WRIGHT, J., expressed no opinion.

JOEL TIFFANY,
State Reporter.

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JOHN A. MERRITT, RESPONDENT, v. HORACE BARTHOLICK, APPELLANT.

Mortgage—Delivery as Collateral—Effect on Assigned Bond.

The mere delivery of a mortgage, given to secure the payment of a bond, by the mortgagee to a creditor as collateral security for a debt owing by the mortgagee, does not pass any interest to the mortgage, as against one holding by assignment the bond secured thereby.

PARKER, J.—If the delivery of the mortgage without the bond, to Wentworth as collateral security for the debt such delivery was intended to secure, operated as a valid assignment of the mortgage to Wentworth, the judgment below is wrong and cannot be sustained.

On the other hand, if it conveyed no interest in the mortgage to Wentworth, then the Defendant who claims his title through Wentworth's foreclosure of that mortgage, has no defence to the Plaintiff's action to foreclose, and no interest in respect to it which under the facts found by the referee can avail him upon this appeal.

The single question for consideration then is, did the deliv-

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Mortgage—Transfer without bond—Effect. 83 *N. Y.* 51; 111 *N. Y.* 301 (19 *St. Rep.* 372); 49 *App. Div.* 278 (62 *N. Y. Supp.* 163) 61 *St. Rep.* 339 (29 *N. Y. Supp.* 828; 31 *Abb. N. C.* 312); 20 *Misc.* 385, 386, 387 (14 *N. Y. Supp.* 605, 606) 89 *N. Y. Supp.* 246; 52 *Hun,* 575 (24 *St. Rep.* 658; 5 *N. Y. Supp.* 526); 67 *Barb.* 399; 43 *Hun,* 140 (5 *St. Rep.* 441); 6 *Rob.* 75; 21 *St. Rep.* 248 (4 *N. Y. Supp.* 956).

Mortgage—Nature of—Incident to debt. 54 *N. Y.* 604; 39 *Hun,* 113; 51 *Hun,* 182 (21 *St. Rep.* 586; 5 *N. Y. Supp.* 172); 1 *Lans.* 119.

Gift—Mortgage—When bond passed. 75 *Hun,* 542 (57 *St. Rep.* 655; 27 *N. Y. Supp.* 495); 70 *App. Div.* 108 (75 *N. Y. Supp.* 13).

Debt—Collateral—Transfer of—Effect. 40 *N. Y.* 485; 81 *N. Y.* 321; 18 *Misc.* 187 (75 *St. Rep.* 851; 41 *N. Y. Supp.* 455); *City Ct. Supp.* 47.

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ery of the mortgage by Merritt, the mortgagee, to Wentworth, under the circumstances stated in the referee's report, operate to invest Wentworth with any interest in the mortgage?

The referee finds that, "On the 16th of July, 1853, or shortly thereafter, the bond and mortgage were assigned by the obligee and mortgagee therein named, to John Campbell, by assignment in writing, which was duly acknowledged and recorded on the 16th day of May, 1853. That prior to the assignment of said bond and mortgage to said Campbell, the mortgage was indebted to Henry T. Wentworth in the sum of $200, borrowed money; that Wentworth desired that said mortgage should be left with him as collateral security for said debt, and that the said Merritt delivered the said mortgage to said Wentworth according to such request, and as collateral security for said debt of $200; that the said mortgage was so delivered to said Wentworth before the same was assigned to said Campbell, but that the bond accompanying the same was not delivered to the said Wentworth at the time, nor was anything said about the same, nor is there any evidence that the same was ever delivered to said Wentworth, nor was there any writing executed in reference to such transfer."

As a mortgage is but an incident to the debt which it is intended to secure (Martin *v.* Mowlin, 2 Burr, 969; Green *v.* Hart, 1 John. R. 580; Jackson *v.* Blodgett, 5 Cow. 202; Jackson *v.* Bronson, 19 John. R. 325; Wilson *v.* Troop, 2 Cow. 231; Cooper *v.* King, 17 Abb. 342), the logical conclusion is, that a transfer of the mortgage without the debt is a nullity, and no interest is assigned by it. The security cannot be separated from the debt and exist independently of it. This is the necessary legal conclusion, and recognized as the rule by a long course of judicial decisions. (See cases above cited; also 4 John. R. 41, 5 John. Ch. 570; 9 Wend. 80.)

Unless, then, the bond was in effect assigned with the mortgage, Wentworth obtained no interest in the mortgage. Did the bond, or the debt which it evidenced, pass to Wentworth? In the first place, the transfer of the mortgage did not of itself operate to transfer the bond, for the legal maxim is, *the inci-*

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dent shall pass by the grant of the principal, but not the principal by the grant of the incident. So that unless we are authorized to say that such was the intent of the parties, we cannot hold that it did. This is a question of fact, which the counsel for the Appellant argues in his points; but unless the referee has found it as a fact, or found facts from which we are bound to infer its existence, it is a question not in the province of this Court to determine.

The act done by Merritt, the mortgagee, was the delivery of the mortgage to Wentworth, and the purpose of the delivery was to secure the payment of the debt of the mortgagee to Wentworth. Does it necessarily follow that the intention of the parties was to transfer the bond? The referee has not found either way upon this question of intent, and therefore, unless the intent in question is to be inferred as a matter of legal necessity from what he does find, it must now be held not to have existed.

If the transfer had been by a written assignment, describing the mortgage alone, and expressing the object to be to secure the debt of the assignor to the assignee, nothing being said about the bond or the debt which it represents, and delivery of the mortgage made, it would be impossible, I think, to hold that the intention was to assign the bond. There would be no opportunity for an implication to that effect. The circumstance that the assignment would be inoperative unless the bond be held to pass, would not give the assignment that effect. The result of such holding would be to reverse the maxim, and make the principal follow the incident. To make the circumstance of its inefficacy a reason for giving it the effect desired, would manifestly uproot the maxim, and establish the contrary rule.

The fact that here the transfer was by manual delivery merely, nothing being said as to the bond or the indebtedness secured by it, does not afford any stronger evidence of the intent to transfer the bond than the case supposed; there is no circumstance in the case not considered in the supposed case; and, as I think, nothing to compel the inference of the intent

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to transfer the bond. I am unable to see, therefore, any escape from the conclusion that, upon this appeal, the judgment of the Supreme Court must be held correct, and affirmed.

Concurring, PORTER, BOCKES, DAVIES, and SCRUGHAM.

HUNT and GROVER for reversal.

Affirmed.

JOEL TIFFANY,
State Reporter.

STEPHEN BRUSH, EXR., RESPONDENTS, *v.* WILLIAM LEE ET AL. APPELLANTS.

Justice's Judgment—Docket—Execution—Issuable by Whom?

When the judgment of a Justice of a District Court has been docketed with the Clerk of the Court of Common Pleas, the attorney, and not the Clerk of the County, is the proper person to issue the execution.

In March, 1860, one Edmonds moved a judgment in a district court of the city of New York, for about eighty dollars, against the Plaintiff's testator, for which an appeal was taken, but not the requisite steps to stay execution. A transcript of the judgment was docketed with the Clerk of the Court of Common Pleas, and an execution issued by A. B. Clark, an attorney for that court, to whom the judgment had been assigned by Edmonds to the sheriff of the city and county of New York, where the testator then resided, and where he had ample personal and real property to satisfy the same. Nothing was done by the sheriff upon this execution. A transcript of the judgment was shortly after docketed in Kings County, and an execution issued to the sheriff of the latter county by Defendant Niles, not an attorney, but a partner with Clark in the law business, in the name of Clark as attorney, upon which latter execution real estate in Brooklyn was levied upon and sold, and

Appeal—Weight of evidence—Reversal 65 *N. Y.* 171; 116 *N. Y.* 198 (26 *St. Rep.* 685); 18 *Misc.* 23 (75 *St. Rep.* 495; 41 *N. Y. Supp.* 39).

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bid off by Edmonds for about one hundred dollars, being of the value over and above incumbrances thereon of about ten thousand dollars. The testator was entirely ignorant of the issue of either execution, and of the sale of the property in Brooklyn, and continued to receive the rents of the property until his death, March 18, 1863. The testator believed that the necessary steps had been taken, and the execution stayed by the appeal. Edmonds, shortly after the sheriff's sale, sold the certificate of the sale to Defendant Lee, who paid therefor the amount of the bid; and the property not having been redeemed, either by the judgment debtor or any incumbrancer at the expiration of the time for that purpose, obtained a deed from the sheriff of the property sold, but which was not placed upon the records for some time thereafter. In the summer of 1863, the Plaintiff, to whom the property sold had been devised in trust, having learned the facts of the sale and conveyance by the sheriff, commenced this action to have the sale and conveyance adjudged void, for the reason that it was a cloud upon his title, basing his claim to such relief upon the ground that the execution was void, having been issued by the attorney; and that Niles had used the name of Clark in issuing the execution; and, also, that Niles and Lee had been guilty of fraud in issuing the execution, and concealing the sale and conveyance by the sheriff. The court, upon trial at Special Term, found as fact the Defendant Niles fraudulently concealed from the testator his acts in the premises, and that Defendant Lee was a party to such fraudulent concealment after becoming assignee of the certificate; and as conclusion of law, that the execution was void upon the ground that it was issued by the attorney of Plaintiff, and not by the clerk, and gave judgment declaring the sale and the sheriff's deed void, and ordering the cancellation of the same. The Defendants took several exceptions to the decision as to the findings of fact and of law, but no exceptions raising the point as a question of law that there was no evidence whatever of fraudulent concealment. After entry of judgment, the Defendants appealed to the General

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Term in the First District, and after affirmance by that Court appealed to this Court.

Barrett for Respondent.
Dyett for Appellant.

GROVER, J.—The Special Term erred in holding as a conclusion of law, that the execution should have been issued by the clerk, and not the party or his attorney. Sec. 68 of the Code, among other things, provides that section 55 to 64, both inclusive, shall apply to the Justices' Courts of the cities, with the following among other exceptions: And except also that in the city and county of New York a judgment of twenty-five dollars, or over, exclusive of costs, the transcript whereof is docketed in the office of the clerk of that county, shall have the same effect as a lien, and be enforced in the same manner as, and be deemed a judgment of, the Court of Common Pleas for the city and county of New York. This it would seem could leave no doubt but that such judgments were to be enforced in the same manner as judgments rendered by the Court of Common Pleas of the city. The Code provides that these latter judgments shall be enforced by executions issued by the party or his attorney. It will be seen that it is by the 13th clause of section 64, that provision is made for the issuing of executions upon judgments of justices of the peace, where transcripts have been filed with county clerks by such clerks. The exception in 68, referred to above, does not make this clause applicable to the city and county of New York, but expressly provides another mode for the enforcement of the judgment. The execution was rightly issued by the attorney. There is nothing in the objection that the execution was issued by Niles, who was not an attorney, in the name of Clark. There is no rule of law or of public policy precluding an attorney from entering into an agreement with one not an attorney to enter his office and act as his clerk, compensating him thereafter by giving him an interest in the business. In such a case, the attorney is responsible to the courts and to all interested to the same extent he

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would be if all the business was done by him personally. The exception to the proof offered upon trial as to the amount of the property of the testator was not well taken, for the reason that such proof could have no possible bearing on the case one way or the other. The party had just as clear a right to issue the execution to Kings County, and collect it there, if the testator had millions of property in New York, as he would have had if he had none there. This right so to do was perfect in either event. (Code, sec. 287.) It is clear that the rights of the Defendants could not in any way be affected by such evidence, and where this is the case an exception to the evidence is unavailing. It is clear that but for the finding of the fact, by the Court at Special Term, that the Defendants fraudulently concealed the issuing of the execution to Kings County, the sale and conveyance of the property by the sheriff, the judgment should be reversed and a new trial ordered.

If that fact was correctly found, it authorizes the judgment rendered. No exception that there was no evidence of such fraud was taken by the Defendants. Had such exception been taken, the question whether there was or was not any such evidence could have been reviewed in this Court. It is error of law for a Court to find a fact of which there is no proof whatever. But to make such error available in this Court, the proper exception presenting it must be taken to the Court below, as this Court, upon appeal, except in special cases regulatied by statutes, reviews only questions of law passed upon by the Court below. I make these observations lest an affirmance should be regarded as an approval of the finding of fact by the Special Term in this case.

I have perused the case, and am wholly unable to see how such a finding can be sustained. Neither Edmonds, his attorney, nor Lee, was under any obligation to inform the testator or his attorney of the issuing of the execution, or of the levy and sale of the property. It was the business of the testator and his attorneys, either to stay the execution upon the appeal, or protect his property, wherever found, from its operation. The judgment creditor had the right to collect his judgment

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in the mode pointed out by law; and if the testator had real estate in Kings, or any other county, it was no fraud upon him to collect the debt out of such property, although he had ample personal property in the city of New York, out of which such judgment might have been collected. So long as the creditor, his attorneys, and agents do no affirmative acts tending to mislead the debtor, and prevent him from protecting his property from sale, or redeeming real estate if sold, there is no ground for imputing fraud, and charging the consequence thereof upon the creditor or purchasers at sales. But, as above stated, the finding of fact cannot be reviewed in this Court. There is no exception that there was no evidence thus presenting it as a question of law; and it is not claimed, nor can it be, that it may be reviewed in this Court as a question of fact upon the weight of evidence.

The General Term might, and perhaps would, have reversed this finding of fact, had it not adopted the erroneous conclusion that the execution was void, not having been issued by the clerk; but this Court has no means of knowing this. It is concluded by the record as it is. The Appellant should have procured from the General Term a reversal of the finding of fact, if that was its conclusion, before appealing to this Court; and then it would have appeared that the judgment was based solely upon the ground that the execution was void, and then the reversal of the judgment now would have followed. But as the record now stands, the judgment must be affirmed.

All concur in result.

A majority held that the statute does not require the execution in such a case to be issued by the County Clerk. Affirmed.

JOEL TIFFANY,
State Reporter.

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JARVIS W. LAKE, APPELLANT, v. THE ARTISANS' BANK, RESPONDENT.

Promissory Note—Endorser not charged—Recovery after Payment.

When an endorser who has not been charged, pays a protested note to the holder under a mistaken idea communicated by the holder, that he has been charged, he may recover back the money paid.

When the Plaintiff had been nonsuited by the Court, in an action tried before a jury, and the Judge in doing so had ignored entirely evidence offered by Plaintiffs, a general exception to the nonsuit was sufficient to enable the appellate Court to refer to the testimony to see if a nonsuit was properly ordered.

PARKER, J.—This action was tried at the Circuit before the Court and a jury, and upon the Plaintiff's resting his cause, the Court, upon the Defendants' motion, dismissed the complaint, to which the counsel for the Plaintiff excepted, and the Judge ordered the exception to be heard in the first instance at the General Term.

I thing the General Term of the Supreme Court was right in regarding the case as properly before it for decision. The exception was one taken upon the trial, and is, I think, within the class of exceptions mentioned in sec. 265 of the Code, which the Judge may order to be heard, in the first instance, at the General Term. The dismissal of the complaint, in this case, was only equivalent to a nonsuit, and raises the same questions (Coit *v.* Beard, 33 Barb. 357; Lomer *v.* Meeker, 25 N. Y. R. 361). The section (subdivision 1) is as follows: "A motion for a new trial on a case, *or exceptions,* or otherwise, and an application for a judgment on a special verdict, or case reserved for argument or further consideration, must,

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Nonsuit—Appeal—Exceptions to be heard at General term. 25 *Hun,* 281; 3 *T. & C.* 349.

Bills and notes—Indorser—Discharge—Payment without knowledge—Restoration. 160 *N. Y.* 196; 20 *Hun,* 164; 30 *App. Div.* 504 (52 *N. Y. Supp.* 467; 28 *Civ. Proc.* 78).

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in the first instance, be heard and decided at the Circuit or Special Term, except that when *exceptions* are taken, the Judge trying the cause may, at the trial, direct them to be heard, in the first instance, at the General Term, etc."

Now, if a motion for a new trial on exceptions, where a nonsuit is granted, the only exception being to the nonsuit, is within the provisions of this section (and it cannot, I think, be doubted that it is), it is equally clear that an exception taken to a nonsuit may be ordered to be heard, in the first instance, at the General Term.

What, then, is the effect of the exception taken? Does it bring up for review the question whether there was anything for the jury to decide, or only the question whether the legal conclusion drawn from the facts which the evidence tended to prove, was the correct one?

In regard to any fact which may be drawn from the evidence bearing upon the ground of the nonsuit, no doubt the Plaintiff is concluded, and such fact is deemed to have been assumed by the Judge with the consent of the Plaintiff. The nonsuit was upon the ground that the Defendant was the owner of the note, and under no obligation to the Plaintiff to charge his prior endorser. All the facts which the evidence tends to prove bearing upon this question, we must deem assumed by the Judge with the Plaintiff's consent. But assuming the Court correct in holding that the Plaintiff had no cause of action against the Defendant for negligence in omitting to charge the prior endorser, still there is another question raised by the pleadings and the evidence; and that is, whether the Plaintiff did not pay the note to the Defendant under such a mistake of facts as to entitle him to recover back the money paid. This question was entirely ignored by the Court at the Circuit, although it is a prominent issue in the case. The evidence is by no means so slight in favor of the Plaintiff, upon this issue, that we can reasonably conclude it was assumed and conceded to be against him; it is, on the contrary, very strongly in his favor. It would be carrying the rule too far, I think, to hold in such a case, that the Court did assume and the Plaintiff con-

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cede the facts bearing upon this issue, which was not at all considered by the Court to be against the Plaintiff. The case was so evidently decided by the Court upon a wrong issue, that I think the execption to such decision should be deemed sufficient upon a review to enable the appellate Court to afford an opportunity for the correction of the error.

The Plaintiff clearly ought not to have been nonsuited in the case. He was not on the 27th of July, when he paid the note, under any legal liability to pay it, for he had not been charged as endorser, and it was then past due. It is said he waived want of notice by the act of payment. True, he did, if he paid with knowledge that he had not been charged (Tibbetts *v.* Dowd, 23 Wend. 379). But it is very questionable whether he did pay with such knowledge. The cashier told him that the note had been protested, and that he had charged over the amount to him. This was equivalent to an assertion that he, the Plaintiff, had been legally charged as endorser, as he might have been without his knowledge, having been absent from his residence and place of business when the note matured, and several days after (Coddington *v.* Davis, 1 Coms. 186). True, the note and two notices of protest from the notary, one directed to him and one to Bates, the prior endorser, were, at the time he was so informed by the cashier, delivered to him with the note. But this was entirely consistent with the fact which he understood from the cashier. The bank being the owner of the note might have preferred to send its own notices.

But even if he did pay, knowing he had not been charged as endorser, still, did he not, as he swears he did, pay under the belief induced by the statement of the cashier, that Bates had been charged? The evidence that he did so pay it, is so strong that the fact is almost undeniable. There is nothing to contradict it but the delivery to him of the notices, as above stated. It is not credible that he paid the note to the Defendant, which there was no obligation on him whatever to pay, knowing that he was not liable, and that his prior endorser, the only other solvent party to the paper, was also discharged by the neglect of the Defendant to charge him.

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If, then, he paid it under the mistake above mentioned, in respect either to his or Bates having been charged as endorser, there can be no doubt that he was entitled to recover (Waite v. Leggett, 8 Cow. 195; Wheadon v. Olds, 20 Wend. 174; Chester v. The Bank of Kingston, 16 N. Y. R. 336).

That would not have constituted a "voluntary payment," for the payment, if so made, was not made with full knowledge of all the material facts.

The Supreme Court at General Term should have set aside the nonsuit, and ordered a new trial. The judgment must therefore be reversed, and a new trial ordered, costs to abide the result.

All concur. Reversed.

JOEL TIFFANY,
State Reporter.

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THE ARTISANS' BANK, RESPONDENTS, v. CHARLES C. BACKERS, APPELLANT.

Promissory Note—What sufficient Notice to Endorser.

All that is essential to be communicated to an endorser to bind him as such, is that the note endorsed by him has not been paid at maturity; that it has been presented and protested for non-payment; together with a sufficient description to identify the note.

DAVIES, Ch.J.—The Defendant is sued as endorser of a promissory note, made by one J. R. Gilmore, payable at Plaintiff's bank. The Plaintiff had discounted a note for the same amount as the note in suit, made by the same parties, and which fell due November 7, 1857, and was protested for non-payment on that day. The president of the Plaintiff applied to Gilmore, the maker, to take up by a new note; and within six days thereafter Gilmore went to the store of the Defendant, and drew the note in suit, payable ninety days after date, to the order of the Defendant, who then endorsed the same. When this note was produced in the trial, it appeared that originally it was dated "November 8, 1857," but that the figure "7" had been written over the figure "8," which was erased, making the note to read as dated, "November 7, 1857." The note was protested on the eighth day of February, 1858, and notice of the protest to the Defendant described the note as dated November 7, 1857, correctly stating the amount thereof, and the name of the maker. It was admitted that the 8th day of November, 1857, fell on Sunday. Upon the trial, the Defendant testified that after the note was filled up and signed by Gilmore, and endorsed by him, it came directly into his hands from those of Gilmore, and did not go out of his hands until it went to the Artisans' Bank; that he took it to the bank and

Notice of protest—Immaterial misdescription. 1 *App. Div.* 28 (72 *St. Rep.* 64; 36 *N. Y. Supp.* 963); 27 *App. Div.* 421 (50 *N. Y. Supp.* 391); 2 *T. & C.* 123.

Promissory note—Extension—Security. 67 *Barb.* 432.

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handed it to the president, Mr. Platt, and that he made no change in the note while it was in his possession; that, on handing it to Mr. Platt, the Defendant received from him the old note, which fell due November 7, and that this new note was made as a substitute for it. He also testified that at the time he endorsed this note, he did not at all notice the date of the note.

Gilmore testified that the original date of the note was November 8, 1857; that he did not alter the figure 8 to 7, as it appears in the note, and did not know who made the alteration; that he was present when the Defendant endorsed the note, and that Defendant took it from him to take to the bank. Gilmore was asked why the note was antedated, and he answered, the object was to date it the same date as of the maturity of the previous note; that he told Defendant at the time he endorsed the note that it was in place of the other note, and that it was made at that time, and with that understanding; and that the only object he had, and the main point was, to get this note dated at the time the other fell due.

Tanner, a clerk in the bank, testified that this note came to the bank to replace another piece of paper, six days overdue; that he received it the same day it came into the bank, and then surrendered another security in place of it; and that he was entirely certain that the note bore date on the 7th, at the time he received it. In this connection it is to be remembered that the Defendant had testified that he took this note to the bank, and delivered it to Platt, the president, and at the same time received from him the old note. It conclusively appeared by the testimony of witnesses, that the substitution of the figure 7 for that of 8 was not in Mr. Platt's handwriting, and two witnesses acquainted with Gilmore's handwriting, testified unequivocally that the figure 7 was Gilmore's writing. It was not alleged, or pretended, that Gilmore had ever seen the note, or had it in his possession, except at the time it was endorsed by the Defendant, and before it was taken to the bank by the Defendant; and if, therefore, the testimony of these two witnesses is to be credited, that the figure 7 was in Gilmore's hand-

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writing, it follows conclusively that such alteration was made either before or at the time the Defendant endorsed the note, and it was certainly made before it was delivered by the Defendant to the bank. The jury was therefore warranted in finding November 7 was the true date of the note before it was delivered by the Defendant to the bank. Whether they were or were not, such is the verdict, and it is not the province of this Court to examine the testimony to see if it is sustained by it. Then we assume that fact as established, and it follows that the note was protested on the day it fell due. The next question is, whether the Defendant was duly charged as endorsee upon the dishonor of the note. Assuming, as we must, that the true date of the note was November 7, 1857, it fell due on the 8th of February, 1858, and on that day it was duly protested. The notary certified, and his certificate under the circumstances was *prima facie* evidence of the facts therein stated, that, on the 8th day of February, 1858, he duly served the Defendant notice of the presentment for payment, and non-payment, and protest of the said promissory note. The Defendant then proved that the following is the notice of protest which he received:—

"*New York,* ——— 18—.

"Please to take notice that a promissory note, made by J. R. Gilmore, for $5,125.70, dated November 7, 1857, payable at the Artisans' Bank in ninety days, endorsed by you, is protested for non-payment, and the holders look to you for the payment thereof"—signed by the same notary who had protested the note and given the certificate already adverted to. It is to be observed, that the Defendant does not contradict the statement of the notary that the notice was served upon him on the 8th day of February, 1858; but it is now contended, on the part of the Defendant, that the notice of protest was not sufficient to charge the Defendant as endorser; that the notice must show that the presentment was made at the proper time; and that this notice is defective in that it has no date, and does not state the day of protest.

Bearing in mind that the main object of the notice it "to

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enable the endorser to take measures for his own security" (Edw. on Bills, 289), can it be doubted that this notice informed this Defendant with reasonable certainty that this particular note had been dishonored? The note was accurately and correctly described in the notice as a note made by J. R. Gilmore, for the correct amount, with the correct date thereof, and payable at the Artisans' Bank in ninety days, and endorsed by Defendant, and declares that the same "is protested." There is no pretence that there was any other note of this description in existence at the time of the protest, and the proof is undeniable that it was protested on the day it fell due. If it was important for the Defendant to know from the notice the day of protest, he had all the elements in the notice to ascertain that fact. The correct date of the note was given, and the time it had to run, namely, ninety days. He therefore saw at a glance that it fell due on the 8th of February, 1858, and on that day this notice was served upon him, correctly describing the note, stating that the same is protested, and that the holders looked to him for the payment thereof. The notice speaks in the present tense, the protest having been made on the day the notice was given, and not as of a past transaction, as that the note was or had been protested. If the notary had verbally, on the 8th of February, stated personally all that is contained in this notice to the Defendant, can any serious question be raised that the Defendant would not have been duly notified of the dishonor of this particular note? He was bound to assume that the notary would not—as he did not, in fact—protest the note before it arrived at maturity, and the notice served on him showed that the note matured the very day of the service of notice of protest. There is no pretence that there was any other note of Gilmore's in existence, endorsed by this Defendant, than the one in suit, and the date of the service of the notice of dishonor informed the Defendant that it was not protested on any day after its maturity. As a matter of fact, it was protested on the day it matured, and there was nothing in the notice at all calculated to mislead the Defendant. The essential facts needful to be communicated to the endorser to

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bind him were: 1. That the note had not been paid at maturity. 2. That it had been protested for non-payment. 3. An identification of the note thus unpaid and protested. All that information was conveyed to this Defendant with reasonable certainty by the notice which was served upon him on the 8th of February, 1858..

A brief reference to a few authorities will show that all has been done to charge this Defendant which the law requires. Cook & Litchfield (5 Seld. 279), is relied upon as showing the insufficiency of the notice in this case. An examination of the facts there presented will show that it is an authority for the contrary doctrine. Four notes were issued by one J. L. Carew, payable to the order of the Defendant, and endorsed by him. They all bore the same date, for equal amounts, and only differed in being payable at nine, ten, eleven, and twelve months from date. When the first note became due, it was protested, and notice given to the endorser in these words: "Please to take notice that a promissory note made by J. L. Carew for $740, with interest, dated April 2, 1849, endorsed by you, was, on the day the same became due, duly protested for non-payment, and that the holders look to you for the payment thereof." It is to be observed that the important fact as to the time the note had to run—essential in that case to its identification— was omitted in that notice, but accurately stated in the notice in this instance. The Plaintiff was the owner and holder of the four notes. Ruggles, Ch.J., in the opinion of the Court, says: "In determining the description of the note or bill is sufficient, the circumstances of the case, and the Defendant's knowledge of those circumstances, may be taken into consideration; and, therefore, where the notice to the drawer of a bill of exchange was, that his draft on A. B. was dishonored, the notice was adjudged to be sufficient, until it was shown that there was another bill drawn by the Defendant on A. B., for which the one in question might be mistaken" (citing 7 Mees & Welsh, 473). But the notices for the three notes last falling due were adjudged insufficient, as they contained no specification of the note referred to in the notice of the protest.

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In reference to these cases, Judge Ruggles said: "Nor does the notice in either case state when the protest mentioned in it was made, except by reference to the time when the note became due, and that time is not specified." The notice was held sufficient to charge the endorser on the note first falling due.

In the case at bar, there was only one note in existence made by Gilmore, and endorsed by the Defendant. The amount of that note is accurately stated in the notice, by whom made and by whom endorsed, its date, when payable, the time it had to run, which showed the time it became due, and declared that the same "is protested," thus referring to an act done simultaneously with the giving the notice. Cayuga Bank *v.* Warden (1 Coms. 413), is an authority to sustain the sufficiency of the notice. It was there held, that whether the demand of payment was duly and regularly made, was matter of evidence to be given at the trial (citing Stochen *v.* Collins, 9 Carr & Payne, 653). Youngs *v.* Lee (2 Kern. 551) is a case in point. There the notice was in these words: "Sir—Please to take notice that a promissory note, drawn by Bell and Goodman, for $1,000, endorsed by you, is protested for non-payment, and that the holders look to you for payment thereof." The notice was dated on the day the note fell due; but there is no indication in the notice of that fact, or when the demand was made; neither was the date of the note given in the notice, the time it had to run, thus showing the date of its maturity, or the place where payable, as in the notice now under consideration. Yet this Court held the notice sufficient to charge the endoresr. Judge Johnson, in the opinion of the Court, says, that the statement in the notice in that case, dated on the day when the note was payable, must be intended to mean that it had been demanded, and payment refused, upon the day when it became due. A statement that a note had been protested on the day it became due, though the day was not stated, nor could be collected from the terms of the notice, was held to be sufficient in Litchfield *v.* Cook (MS., Dec. 1853), in this Court.

In Home Ins. Co. *v.* Green (19 N. Y. 519), Denio, J., correctly observed, that it was true that no precise form is neces-

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sary for these notices; but they must reasonably apprise the party of the particular paper upon which he is sought to be charged. In that case, the name of the maker of the note was left blank, and it was held that the notice did not satisfy that requirement. The facts in Hodge *v.* Shuler (22 N. Y. 114) were these: The Defendants were sought to be charged as endorsers of a promissory note issued by a railroad company, signed by Sam. Henshaw, treasurer, and F. Follett, president, for the sum of $1,000, payable to the order of the Defendants. The note bore date April 1, 1850. It appeared that the Defendants were contractors in building the road for said Company, and that on or about the date of said note, they received from said Company, in satisfaction of their contract and work, the note in suit, and four other notes of the same date, and amounts in every respect corresponing with the note in suit, except that the numbers of all the said notes marked thereon were different each from the other. The notice of protest served on the Defendants, omitting the date thereof, was in these words: "Please take notice that a promissory note made by S. Henshaw, treasurer, for $1,000, dated April 1st. 1850, payable in four years, in favor of yourselves, and endorsed by you, has been presented by me to the office of the Treasurer, and payment being duly demanded was refused, whereupon by direction of the holder the same has been protested, and payment thereof is requested of you." The law applicable to notices of this character is thus clearly stated by Judge Wright. "A notice that, in terms, or by necessary implication, or reasonable intendment, informs the endorser that the note has become due, and has been presented to the maker and payment refused, is sufficient. The party to whom the notice is addressed should not be misled by an indefinite or uncertain description of the note, and from the imperfection of the notice itself be unable to determine to what particular note it refers. A notice which omits an essential feature of the note, or misdescribes it, is an imperfect one, but not necessarily invalid. It is invalid only when it fails to give that particular information which it would have given but for its particular imper-

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fection; and even in case the notice in itself be defective, if from the evidence *aliunde* of the attendant circumstances, it is apparent that the endorser was not deceived or misled as to the identity of the dishonored note, he will be charged. A note is well described when its maker, payee, date, amount, and time and place of payment, are stated." As already observed, all these essential particulars are contained in the notice given in the present instance.

The same doctrine is enunciated by the Supreme Court of the United States in Mills *v.* Bank of the United States, 11 Wheaton, 431, and reaffirmed in this court in the two case of the Bank of Cooperstown *v.* Woods (28 N. Y. 545-561), upon principle and authority, therefore, we are bound to hold the notice sufficient in this case to charge the endorser, and the omission to date it was an immaterial circumstance. That omission, in this instance, could not and did not mislead the Defendant in the identification of the note protested.

There remains to be considered one other question, viz., whether the Plaintiff gave time to the maker of the note, whereby the endorser was discharged. Upon this point the Judge charged the jury as follows: "If you come to the conclusion that there ever was a valid and subsisting agreement between Gilmore and the bank, or Platt, to extend the time of payment, and to give these securities, and that the bank ac-accepted them, then you will have to find for the Defendant, because the result of it is, that it would extend the time of payment to Gilmore upon the promissory note upon which this action is brought for a year, or for whatever time was agreed upon. Such extension, if made, was without the consent of Backer, the endorser, and it will render his engagement, which is that of a surety, invalid. But, on the other hand, if you come to the conclusion that Gilmore's testimony is not reliable, and that there never was a valid and subsisting agreement, and no agreement was made, and these mortgages were not valid securities in the hands of the bank, then the defence founded on the extension of time to Gilmore fails."

The Defendant in his answer alleged, that the Plaintiff, for

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a valuable consideration, after the maturity of said note, and without the knowledge or assent of the Defendant, made an agreement with Gilmore, the maker of the note whereby Plaintiff agreed to extend the time for the payment of said note for the period of one year, from the date of said agreement. He also set up that after the maturity of the note the Plaintiff took from Gilmore a certain mortgage on lands in New Jersey, "as collateral security for his entire indebtedness to the Plaintiff, but upon the understanding and agreement that the same should be applied first to the satisfaction of so much of said indebtedness as was secured by the said promissory note. "That said mortgage was a lien upon property of great value, and that subsequently the Plaintiff discharged the same of record, and the same was surrendered and delivered up to Gilmore." The substance of this allegation is, that the Plaintiff took the mortgage as collateral security, and subsequently cancelled it. There is no claim that the Plaintiff ever collected or received anything on account thereof, or that by the exercise of true diligence he might have obtained anything thereon. There is no averment that the mortgage was of any value. It might well be a lien on property of great value; yet if it was not a primary lien, or if it did not appear that the prior liens were less than the value of the property covered by them, it would not follow that the Plaintiff surrendered security of any value by the discharge of this mortgage.

From the facts set up in the answer, it did not appear that the Defendant had been in any way damnified by the dealings of the Plaintiff with Gilmore in respect to this mortgage.

As to the extension of time, Gilmore upon the trial testified that after the note became due, there was an agreement between himself and Plaintiff's president. He says it was an extension of the whole indebtedness for one year, with the privilege of two, if it was required, to carry out certain operations he, Gilmore, had projected. He was to give the bank security on a considerable amount of property in New Jersey, and the bank was to loan him $10,000 on the property, he applying this $10,000 to the improvement of the property. To carry

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out this arrangement, Gilmore, with his wife, executed to the bank two mortgages which he placed in the hands of the attorney of the bank. He further testified that he never received the $10,000, or any part of it, and that the Plaintiff failed to carry out his part of the arrangement.

It appeared on the part of the Plaintiff, that an agreement was drawn up to be executed between the Plaintiff and Gilmore, but that it never was signed. The agreement for the extension of time to Gilmore for the payment of the note, depended wholly upon Gilmore's testimony; and the Judge at the Circuit very properly told the jury that if Gilmore's testimony was to be believed, and they found that a valid and subsisting agreement had been made between the Plaintiff and Gilmore extending the time of payment of the note without the consent of Backers, then Backers standing as surety for the payment of this note was discharged. But, on the other hand, if the jury came to the conclusion that Gilmore's testimony was not reliable, and that no valid subsisting agreement was ever made, then the defence founded on the extension of time to Gilmore failed. The charge of the Judge to the jury is in harmony with the doctrine laid down by this Court in Halliday *v.* Hart (30 N. Y. Rep. 474); and upon the facts as found by the jury in the present case, that authority is decisive of this case. It was vital to the establishment of the agreement to give time, that Gilmore's statement to that effect should be believed. There was no foundation for the existence of this agreement but his testimony. Martin, a witness for the Defendant, expressly negatives the idea that any agreement for extension of the time for the payment of this note was ever made with Gilmore. He states that Gilmore proposed an extension of his indebtedness for twelve months, and that he would give security, and there were other terms, among which was one that the bank should advance to Gilmore $10,000 or $20,000. It is apparent from the testimony of both witnesses that this negotiation fell through. By the terms of the mortgage, no extension of time for the payment of Gilmore's indebtedness which was secured by it (and it professed to secure the whole) was given,

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or provided for or mentioned. It contemplated and declared that the whole amount thus secured was due presently and immediately demandable, and negatives the idea or statement of Gilmore that twelve months were given to him for the payment of his indebtedness to the bank.

It is difficult to believe that if the bank had agreed to give Gilmore one or two years for the payment of his indebtedness to it, and such time was given in consideration of his securing the same by a mortgage, such mortgage should not only have been silent as to such time, but in express terms should have made the amount secured thereby immediately payable.

To establish this defence as set up and claimed by the answer, it was essential to make out the existence of the agreement relied on. That was a question of fact which was properly left to the jury. They have found it adverse to the claim of the Defendant's answer, and this Court is to assume that no such agreement was ever made as therein set forth.

This disposes of this ground of defence, and the judgment appealed from must therefore be affirmed with costs.

GROVER, J.—It is well settled that an error in denying a nonsuit at the close of the Plaintiff's case for a defect of proof is cured, if such proof is supplied at a subsequent stage of the trial. This renders it unnecessary to determine whether the Plaintiff was bound in the first instance to give any evidence as to the alteration of the date of the note apparent on its face. Evidence upon this point was subsequently given by both parties, and the question properly submitted to the jury. The only legal question arising upon the extension given by the Plaintiff to Gilmore, the maker of the note for payment, was whether the Judge should have directed a verdict for the Defendant, or submit the question of Gilmore's credibility to the jury. I think the submission of the latter question to the jury not error. It is the duty of the Court to direct a verdict in accordance with the evidence in cases where there is no reasonable doubt about the facts, and to assume that the testimony of a witness is correct, where there is no apparent reason to doubt its truth. But

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when such doubt exists, founded either upon the improbability of the testimony, the manner of the witness, or the inconsistency of the testimony with other facts appearing in the case, the question should be submitted to the jury. In the present case Gilmore testified that one of the provisions of the agreement by which it was claimed the time was extended, was that the bank should loan him the further sum of $10,000. This had never been done, and although years had elapsed it did not appear that any portion of the money had been called for, nor was there any explanation why it had not been attempted. It also appeared that the bank had cancelled of record one of the mortgages given as was claimed pursuant to the agreement, without receiving any pay or further security upon the large debt owing it by Gilmore. The president of the bank, with whom it was claimed the agreement was made, was dead. This, I think, together presented a proper case to submit the credibility of Gilmore's testimony to the jury.

Whether the jury came to the proper conclusion thereon is a question for the consideration of the Supreme Court, but not for this Court. Indeed, the Supreme Court at General Term upon appeal from the judgment has no power to set aside a verdict on the ground that it is against the weight of evidence. That can only be done upon an appeal from an order of Special Term granting or denying a new trial.

The only remaining question is, whether the notice of dishonor of the note served upon the Defendant was sufficient. The defect claimed is that it did not inform the Defendant that the note was presented at maturity, or when it was presented for payment, and dishonored. The notice is without date, properly describes the note, and says it is protested. The certificate of the notary shows presentment and dishonor on the day the note matured, and that this notice was on the same day mailed, postpaid at the proper place, and addressed to the Defendant. As an original question I should hold this notice insufficient. From it the Defendant could not tell whether the note was presented at the proper time or not. Wynn v. Alden (4 Denio, 163), holds such a notice insufficient for the reason

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above assigned. But I am unable to distinguish this case from Youngs *v.* Lee (2 Kern. 552), determined by this Court. The notice in that case in respect to the point under consideration was precisely like the one in the present case, except that it was dated upon the day of the maturity of the note. It is a settled rule, that in considering the sufficiency of a notice, any extrinsic fact known to the Defendant which would inform him fully in respect of any fact in which the notice was defective must be taken into account, and the point determined whether the notice aided by such fact gave necessary information. (See case last cited.) The Court may, I think, take judicial notice of the manner of mailing letters; that is, that the date of mailing is uniformly stamped thereon. Then all the Defendant had to do was to look at the time of mailing the notice, and he would see that it was upon the day the note matured. This proved that the note was protested that day, as clearly as though the notice bore date upon that day. If, therefore, the date of the notice in Youngs *v.* Lee informed the Defendant that the note was protested on that day, and not before, it would follow that the date of the mailing the letter conveyed the same information.

It is important that a rule established by this Court should be adhered to in all cases coming within the same principle. My conclusion is that upon this authority the judgment should be affirmed.

All concur. Affirmed.

JOEL TIFFANY,
State Reporter.

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ABRAHAM X. PARKER, TRUSTEE, APPELLANT, v. BENJAMIN F. JERVIS AND OTHERS, RESPONDENTS.

Appeal—No Review of Questions of Fact—Code, Sections 264, 265.

Upon appeal, where a trial was had before a jury, there is no power in this Court, or in the General Term, to review the questions of fact. If there was any evidence upon which the finding of the jury could be sustained, their finding was conclusive.

THIS is an appeal by the Plaintiff, from an order of the Supreme Court, made at General Term, in the Fourth District, reversing a judgment in favor of the Plaintiff, rendered on the verdict of a jury, and ordering a new trial. The facts are stated in the opinion of the Court.

John H. Reynolds for Appellant.
Charles Tracy for Respondents.

HUNT, J.—This action was brought to recover damages for the taking by Defendants of certain personal property, assigned by one George H. Goodridge to Wm. C. Chipman, for the benefit of creditors. The action was brought in the name of Chipman as Plaintiff, and Chipman having died pending the proceedings, the Plaintiff has been substituted as trustee and Plaintiff in his stead. The Defendants justified the seizure as judgment creditors of Goodridge, claiming that the assignment was fraudulent and void, and that the property belonged to him. After the evidence was all introduced, the Defendants moved for a nonsuit, on the ground that there had been no actual delivery or change of possession of the assigned property. The Court refused the motion, and the jury found a verdict for the Plaintiff. The Defendant moved for a new trial at the Special Term, which was denied. Upon appeal to the General Term it was held that the Plaintiff should have been nonsuited, and for that reason the judgment was reversed

Appeal—Review of question of fact. 38 *N. Y.* 164; 42 *N. Y.* 17; *Hun,* 180; 53 *Barb.* 62; 55 *Barb.* 196; 37 *How. Pr.* 297; 3 *T. & C.* 722; 40 *Super. Ct.* 90; 13 *Daly,* 530.

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and a new trial ordered. From this judgment of reversal the Plaintiff appeals to this Court, stipulating that if the order of the General Term be affirmed, judgment absolute shall be rendered against him.

It will be observed that the present was the case of a jury trial, and the proceedings upon the motion for a new trial are regulated by sections 264 and 265 of the Code. The proceedings when the trial is had by the Court, are regulated by section 268, and when a trial is had before a referee the appeal is regulated by section 272 of the Code. In each of the latter cases, viz., when the trial is had by the Court, or when it is had before a referee, this Court is authorized to review the questions of fact existing in the case, if it is certified in the order of reversal that the judgment was reversed on questions of fact. Upon appeals where the trial was had before a jury, there is no power in this Court, in any event, to review the questions of fact, nor do I find any such power existing in the General Term. In the classes of trials before a referee, and before the Court, power is expressly given to the General Term, by the sections quoted, to review the questions of fact; but when the trial is before a jury, no such power is given and none exists. If there is evidence competent upon the questions submitted, and sufficient to authorize their verdict, it is not open to reexamination in the Court above. The finding of the jury is conclusive.

In the present case the Court below has not undertaken to review the finding of the jury upon the facts, in form, but after giving its idea of the evidence and its effect, say, "These indications added to the presumption which the statute implies, were sufficient to take the case from the jury, and it should have been so taken away," and thereupon the judgment was reversed and a new trial granted. I am obliged to differ from these conclusions, and am of the opinion that a fair case was presented for the judgment of the jury. What is the practice of this Court in such a case? In Sanford v. Eighth Ave. R. R. Co. (23 N. Y. 343), Judge Comstock lays down the rule in these words: "When the trial is by jury, we have no power, under the existing rules of law, to review any question of fact deter-

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mined in the subordinate Courts. In this case, therefore, we should be obliged to affirm the order granting a new trial, if that order could stand consistently with any view to be taken of the evidence given at the trial. But we are of opinion that after giving the Defendant the benefit of whatever conflict there may be in the testimony, and after examining the facts proved in the light most favorable to him, the Plaintiff was entitled to a verdict." The result arrived at in that case was the proper one, and the case was rightly decided. The principle announced I think was erroneous. It was not the duty of this Court "to affirm the order granting a new trial, if that order could stand consistently with any view of the evidence." Neither this Court nor the General Term had any right to review the facts. But a single question could arise before the General Term, and that was whether there was any evidence upon which the finding of the jury could be sustained. The weight of evidence, the criticisms upon it, and the inferences to be drawn from it, were for the jury exclusively. If the case admitted of different "views," the judgment of the jury was conclusive. So in the present case, if the General Term are to be understood as reviewing the facts, and overriding the judgment of the jury, they exceeded their jurisdiction, and their judgment cannot be sustained. If they intended to decide that there was no proof by which the assignment could be maintained, that giving full effect and credence to the Plaintiff's testimony, it did not sustain his claim, then a question of law was presented, properly passed upon by them, and properly to be considered here.

I will examine this question. The objection was that there was not an immediate delivery of the goods, and an actual and continued change of possession. The assignment was made to Chipman, a creditor living in the immediate vicinity. It was made in the afternoon, in an upper chamber of the store building, in the presence of witnesses. At the time of executing the assignment, the assignor delivered to the assignee the keys of the store, for the purpose of giving him dominion over the property. The former clerks were discharged by the assignor, and were again employed by the assignee to take charge of and remain with the goods for the assignee. They did so take

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charge and hold the goods for the assignee, and in their actual possession. The assignee at the same time took the books, the notes, and accounts from the store to his office. The signs were taken down, and there is no evidence that the assignor after this period ever had or exercised any dominion or control over any of the goods, or that he was ever in or at the store where the goods were kept. The New York creditors were informed within a few days by the assignee in person, that an assignment had been made. This evidence shows a fair case of a delivery of the goods, and a continued change of possession under the assignment.

It cannot be denied, and need not be, that the conduct of the assignor and of the assignee, when in New York, immediately after the assignment, was open to criticism. Conflicting statements, however, were made, and as detailed by the assignee the transactions were much less objectionable than as detailed in the evidence of the creditors. It was for the jury to say which statement they would rely upon, and it was for the jury to say whether they credited the Plaintiff's evidence, to which I have before referred. By their verdict they affirmed that they did credit it. The Defendants then claimed, as they claim now, that the assignment was void: (1) Because of the want of delivery, and continued change of possession. (2) For actual fraud in the purpose and intent of the assignment. There was evidence sufficient to justify the jury in finding a delivery and change of possession, and in finding that there was no fraud. Having so found, we cannot interfere.

If any valid exception had been taken by the Defendants on the trial, the judgment of reversal could be sustained on that ground. None such is referred to by the Defendants' counsel in their points, and in examining the case I find but a single exception to the verdict on their part, and that is without merit.

Order for new trial should be reversed, and judgment upon the verdict affirmed.

All the Judges concur in the above except Judge GROVER.

Judgment accordingly.

JOEL TIFFANY,
State Reporter.

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CORNELIUS VANDERZEE AND HANNAH VANDERZEE, RESPONDENTS, v. JOHN B. VANDERZEE, APPELLANT.

Will—Leases in Fee—Words of Perpetuity.

Where the introductory clause of a will is as follows, "And as for that worldly estate wherewith it hath pleased God to bless me, I dispose of as follows," it may be deemed to be the intention of the testator to dispose of all his estate by the will; so that a subsequent devise without words of perpetuity, may convey a fee, when there is a residuary clause in the will as to personal estate.

But where there is no residuary clause, either as to land or personal estate, and the devise has respect to land alone, it may be otherwise.

SCRUGHAM, J.—The position that Cornelius Vanderzee, Jr., had no heritable interest in that portion of the property in question, which is described in his will as the new possession, cannot be maintained. This land consisted of two parcels, containing in all one hundred and seventy-two acres, adjoining, on either side, a parcel of one hundred and twenty acres, which was leased in fee to Cornelius Vanderzee, Jr., under written lease, dated 4th of September, 1769, by Stephen Van Rensselaer, who was at that time the owner of all the land in question.

The whole tract was claimed and possessed by Cornelius Vanderzee, Jr., as under a lease and fee, from 1790 up to and at his death in 1800, and he devised it by his will.

It does not appear that at any time during his life he paid any rent for the portion known as the new possession; but an account was kept against him by the landlord for this rent, and a separate account for the rent of the parcel of one hundred and twenty acres described in written lease. A map and survey of the whole tract of two hundred and ninety-two acres was made in 1790, and kept by the landlord, among whose ancient papers it was lately found; and upon the map of the

Devise—Meaning of word "Heirs." 4 *Hun,* 725.

Conveyance—Words of perpetuity. 39 *N. Y.* 15; 62 *N. Y.* 549; 2 *Abb. App. Dec.* 325 (4 *Abb. N. S.* 430).

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property is described by the words and figures, "Cornelius Vanderzee's 292 acres," and the survey describing the whole tract of two hundred and ninety-two acres commences with the words, "Cornelius Vanderzee's begins at a stake, &c." In 1814 or 1815, Storm Vanderzee who was then in possession of the whole tract, claiming to be the owner of it as devisee of his father, Cornelius Vanderzee, Jr., settled with the landlord for all rent in arrear, from 1790 to the date of settlement. The rent of the portion known as the new possession was computed at the same rate per acre as that of the portion embraced in the written lease. And an amount was paid by him to the landlord, in compromise of his claims for rent of both portions; greatly the larger part of the sum being for the rent of the new possession. The title of Cornelius Vanderzee, Jr., as tenant in fee of the new possession, has thus been uniformly recognized by the landlord.

The circumstances warrant the presumption of a grant of a lease in fee. The will was executed and took effect before the Revised Statutes; and as the clause in it devising the property in question contained no words of inheritance, we must construe it as devising only a life estate, unless the context of the will plainly shows the intention to give the property in fee. The words in the introductory clause, "And as for that worldly estate wherewith it hath pleased God to bless me, I dispose of as follows," declare the intention of the testator to dispose of all of his estate by his will. The will in the case of Charter *v.* Otis (41 Barbour, 525), contained a similar introductory clause; and it was held that a subsequent devise of land, without words of perpetuity, conveyed a fee, but that case differed from this in important particulars. There the will contained a residuary clause as to personal estate, but none as to the real property, and the devise of land which was the subject of consideration was coupled with a gift of personal property in the same clause, the same words being used in disposing of both species of property. These were properly considered as circumstances strongly indicating the intention of the testator to give a fee in the land devised. The will in this case contains

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no residuary clause, either as to real or personal property, and the clause containing the devise in question, relates to land alone; and although the introductory clause declares the intention of the testator to dispose of all of his property, it is only the declaration of a general purpose, which he may nevertheless fail to execute. There is nothing in the devise in question which in any manner connects it with this introductory clause, but in a subsequent part of the will the following clause occurs: "Further, I make my wife master of one-third of my aforesaid estate as long as she remains my widow, and after her marriage or death to be and belong to my aforesaid son Storm Vanderzee."

It is urged that by this use of the word "estate," the testator manifested his intention that Storm Vanderzee should take a fee in the land devised to him. That the word was used to indicate the farms given to Storm Vanderzee is quite apparent from the fact that if it referred to that "worldly estate" mentioned in the introductory clause, the devise would be inconsistent with most of the other devises in the will.

Doubtless the object of the clause in which it occurs, was to provide for the dower of the testator's wife, of which he may have thought she might be deprived by the previous devise to Storm Vanderzee of a life estate in all of his land; and the word "estate" was used rather for description, and to distinquish the land previously devised from the personal property, than for the purpose of marking the quantity of the interest devised to Storm Vanderzee. In that previous devise the testator used language which, previous to the Revised Statutes, clearly imported a design to give only an estate for life. That he understood this, and so intended it in the first instance, is to be presumed; and that he knew that the use of words of perpetuity was important in a devise of the entire interest in the thing devised, may fairly be inferred from his adopting them, though unnecessarily, in other parts of the will, where it is apparent he intended to confer absolute property. He gives to his wife a negro man and a mare, "to her and her heirs;" to three of his daughters "and their heirs" each two cows; to his

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five daughters and "to their heirs" each twenty dollars; to his sons Walter and John "and to their heirs" each two hundred dollars; to his wife his household furniture as long as she shall remain his widow, and at her marriage or death he gives it to his five daughters, "to be equally divided between them;" and to his wife the remainder of his horses and cows as long as she shall remain his widow, and he gives them after her marriage or death to two of his sons and his five daughters, "and to their heirs forever." Thus it will be noticed that in all these gifts of personal estate he uses words which would be sufficient, if the devises were of real estate to carry the fee to the devisees respectively.

This would seem to indicate that he believed the use of such words necessary to a devise of absolute property; and if he did so regard them, then this omission to use them in this devise of land to his son Storm Vanderzee, would clearly denote an intention that the fee should not pass.

The circumstance that no such words were used in the bequest of one dollar to his son Garrett Vanderzee, or in that of the farming utensils to Storm Vanderzee, is not altogether irreconcilable with the supposition that he believed the use of the words of perpetuity necessary to a devise of absolute property, for the first was doubtless intended merely as a formal legacy, and the second was of articles used upon and with the farm, which he may reasonably have designed should follow it, and belong to Storm only so long as he held it.

It is true that the use of the words of perpetuity in these legacies of personal estate, does not prove that the testator believed them necessary to every devise of the entire interest in the thing devised, but the presumption to that effect is certainly as reasonable and consistent with the circumstances as any other which they warrant; and in its presence it is impossible to say that it is clear, from the face of the will, that the testator intended to devise an estate in fee to Sorm Vanderzee.

The judgment should be affirmed.

JOEL TIFFANY,
State Reporter.

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RICHARD P. BRUFF, EXECUTOR, v. HIPPOLITE MALI AND OTIS P. JEWETT.

Evidence—Corporation—Issue of Spurious Stock—Burden of Proof.

In an action against the defendant for fraud committed by issuing spurious stock in a coal company, of which he was the President, to the Plaintiff, it is incumbent on the Plaintiff to prove that the stock issued to him was spurious; and having proved that his stock was issued to him after the full amount of the company's stock had been issued, it is incumbent on the Defendant to prove that such stock was issued on the surrender of genuine certificates of the company's stock.

BOCKES, J.—This action was brought by Shotwell, since deceased, and is now prosecuted by his executor, who has been substituted as Plaintiff in the cause.

A recovery was had against Mali and Jewett, former president and vice-president of the Parker Vein Coal Company, a corporation created by the laws of Maryland, having its principal place of business in New York.

The complaint contained three separate counts or causes of action. In the first, after an averment that the Plaintiff was a stockholder, it was charged that the Defendants misconducted in their offices of president and vice-president, and wrongfully and fraudulently over-issued the stock of the company, by reason of which the Plaintiff's stock was rendered unsalable and valueless. In the second, it was charged that the Defendants made false and fraudulent representations in regard to the financial affairs of the company, whereby the Plaintiff was induced to purchase stock of the company which in fact was valueless. In the third, it was averred that the Defendants, as officers of the company, and after the whole amount of the capital stock had been issued, made and issued other certificates

Corporation—Spurious issues of stock—Liability. 61 *N. Y.* 245; 80 *N. Y.* 534; 5 *Hun,* 136; 12 *Hun,* 104; 5 *Lans.* 255.

False representations—To general public—Availability. 83 *N. Y.* 34; 28 *App. Div.* 5 (50 *N. Y. Supp.* 783).

Action for deceit—Discovery. 39 *Misc.* 243 (79 *N. Y. Supp.* 434).

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purporting to be genuine certificates of shares of the capital stock of the company, which were false and fraudulent, and sold and disposed of the same as true and genuine stock; four hundred and eighty shares of which the Plaintiff purchased and received as genuine, to his great damage.

On the trial the judge held and decided that the Plaintiff was not entitled to recover on either the first or the second count of the complaint. Whether he was right or wrong in this ruling is not before us for decision, inasmuch as the Plaintiff did not appeal. The recovery was under the third count, and the questions presented to this Court for examination arise under the appeal by the Defendants from the judgment having its basis on that count.

It may be well to examine the case in the order in which the questions arose on the trial. It was not disputed that the Defendants Mali and Jewett were officers of the company. Both were directors, the former its president and the latter its vice-president. Nor was it controverted before the Court on the trial, that after the whole capital stock was filled and certificates for the entire amount issued, the Defendants without authority continued to make further and over-issues to an erroneous and ruinous amount. It was proved, or there was evidence tending to prove, that the fraudulent or over-issues were made prior to the time when the Plaintiff made his purchases, and prior to the date of certificates of stock issued to them—in small numbers at first and afterwards freely—and that the over-issues were made by the Defendants deliberately, from time to time, as inducements were suggested. The authorized capital stock was $3,000,000. The spurious stock, from over-issues, exceeded $12,000,000.

Under this state of facts the Plaintiff rested the case, and the Defendants moved for a dismissal of the complaint. The judge remarked in substance, that it appeared from the evidence that the Plaintiff's certificates of stock were issued after the stock was full and over-issues had commenced, and that, in the absence of evidence that the certificates were given on the surrender of stock, it was for the jury to say whether they were

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genuine; and he denied the motion. This ruling was manifestly correct. The genuine certificates were all out before those obtained by the Plaintiff were issued. There was no proof then that any of the genuine certificates had been surrendered and new ones issued in their place. It might well be that there had been, but there was no proof of it in the case. There was only a suspicion growing out of a probability, because the stock, or what purported to be the stock, of the company had been in the market.

Thereupon evidence was given by the Defendants to the effect that, from a time prior to the purchase by the Plaintiff of his stock, there were surrenders and transfers of certificates to a very great extent daily at the office of the company. But the witness was unable to say whether such surrenders and transfers were of the genuine or spurious stocks—at least he did not identify a single transaction of the kind where the stock was issued prior to the issuing of the spurious certificates; and in regard to the certificates held by the Plaintiff, he said it was impossible for him to say whether they were issued on the sale of stock for cash, or whether they were issued on the surrender of other certificates—that it would be a mere presumption for him to state. The judge was then requested to hold and to instruct the jury that there was not sufficient evidence to warrant a finding that the stock in question was not genuine; which he declined to do. This decision was also correct. It was very doubtful whether the case was materially changed from what it was when the Plaintiff rested.

Did the evidence given by the Defendants clearly and indisputably establish the fact that the Plaintiff's certificates were genuine, or were issued on a surrender or transfer of genuine stock? Certainly not; and if not, then the question still remained for the jury, and it would have been error to have instructed them as requested.

Even if the case had been changed by the Defendants' evidence, unless made entirely certain in their favor, it would still remain for the jury to say what effect should be given to the evidence—especially if it was to a considerable degree a matter of opinion or reasoning—and also to what extent a change had

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been effected by the proof. All that the Defendants could rightfully claim, as regards this point, was that the judge should charge, as he did do, that, to entitle the Plaintiff to recover, he was bound to prove to the satisfaction of the jury that the certificates bought hy him did not represent genuine stock, or any part of the stock of the company, but constituted part of the over-issue, not authorized by its charter. There was evidence before the jury bearing strongly on this question. The entire stock of the company had been taken and certificates therefor issued; after which, and prior to the purchase by the Plaintiff, the Defendants had commenced their system of false issues.

The Plaintiff's certificates certainly belonged to the class of spurious issues, unless genuine ones had been surrendered and new ones sent out in their place.

The burden was on them to remove the inference deducible from these facts; and which they could have done by showing that the Plaintiff's certificates were issued on the surrender, or on the transfer of genuine stock. This might be difficult; but if so, or even if actually impossible, the Defendants should not be heard to complain, when their own admitted culpability creates the dilemma.

No error occured in the admission or rejection of evidence, nor was any admitted against objection bearing on the question submitted to the jury; nor was any excluded to which the Defendants were entitled. They were allowed to prove that that Plaintiff voted, or authorized some one to vote on his stock, as some evidence bearing on the question of its genuineness. But the offer to show that the directors of the Parker Vein Coal Company, with the consent of the Plaintiff, transferred the property of the company to the American Coal Company, and accepted the stock of the latter in exchange for the stock of the former, and that the plaintiff took stock in the latter under this arrangement, was properly rejected. Those facts had no tendency to prove that the Plaintiff's certificates represented the genuine stock of the original company. How he disposed of the stock did not prove it genuine or otherwise. This was a matter with which the Defendants had no concern. Their

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liabiliay was complete, if liable at all, at the time of the purchase by the Plaintiff.

The case having been properly sent to the jury, and the jury having found in favor of the Plaintiff, must now be further examined, on the hypothesis that the Plaintiff's certificates did not represent the genuine stock of the company, but were spurious. In this view the Defendants asked the judge to charge the jury as matter of law, even if suprious, there was no evidence that the certficates in question were purchased from the Defendants, or from the Parker Vein Coal Company, and that, if not purchased from either, then they were not liable in this action. These requests, and the refusal of the judge so to hold and charge, present the only remaining question of importance pressed on our consideration.

The learned judge instructed the jury on this point as follows: "That there was no evidence that the certificates were purchased from either the Defendants or the company, but that it was unnecessary for the Plaintiff to prove that he purchased from either; that if the Defendants issued the stock, and the Plaintiff purchased it on the faith that it was genuine, authenticated as it was, the Defendants were liable, although the actual purchase was made of others." It is undoubtedly true that a vendor of property guilty of a fraud on its sale, or who sells with warranty, is liable only to his vendee.

A subsequent purchaser acquires no right of action therefor. As was well stated by the Court below, there is in such case no privity between the vendor and such subsequent purchaser. But is such this case? Let us see clearly what facts must be deemed established by the verdict of the jury.

The verdict is general for Plaintiff, and every intendment is in favor both of its correctness and completeness to sustain the recovery. The jury have found that the certificates of stock purchased by the Plaintiff were spurious, that the Defendants issued or caused them to be issued with a fraudulent purpose, and that the Plaintiff purchased them in good faith, supposing them to be genuine; that is, supposing them truly to represent a part of the capital stock of the company. That they could not be enforced or employed as stock—in other words, that they

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gave the purchaser no rights as stockholders, is decided in The N. Y. and N. H. R. R. Co. v. Schuyler (34 N. Y. 30). These false certificates were sent forth by the Defendants, were thrown in the market by them, as was said in this case cited, "with a view to well known and established commercial usages." They authenticated them, falsely and fraudulently attested them as genuine. They bore on their face such false attestation, which was equivalent to an assertion on their part to all persons who should purchase, or to whom they should be offered, that they were genuine. In this way they invited confidence, and induced trade. These acts were done with the intent to defraud any and all purchasers, well knowing that every person to whose hands these false certificates should come by fair purchase might be injured. Wherefore, having authenticated and issued these certificates for the purpose of defrauding, the Defendants should be held liable to any one sustaining damage by purchasing on the faith of their genuineness. In this view the Defendants are to be considered as acting directly upon and influencing the purchaser; and of course liable, as every tortfeasor is, for the damages occasioned by their wrongful act. It was held in the N. Y. and N. H. R. R. case above cited, that every bona fide holder of spurious certificates (issued as were those of the Plaintiff here(had a right of action against the company for negligence, in permitting its officer and agent to perpetrate a systematic course of fraud like that proved in this case. It mattered not how many transfers had been made. If the certificates had their origin in the fraudulent or over-issues, they were void, and the bona fide holder had his claim against the company for damages occasioned by the fraudulent act of its agent, and in such case a joint action will lie against principal and agent (Phelps v. Wait, 30 N. Y. 78); or a separate action against either (Suydam v. Moore and Losee, 8 Barb. 358). The wrongful acts is the servant's in fact, and the principal's by construction. So the rule which held the company liable in the N. Y. and N. H. R. R. case to bona fide holders of the spurious certificates, would certainly have held Schuyler, the agent who perpetrated the fraud, also liable. It was also decided in this case, that to entitle a party holding spurious certifi-

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cates to sue, no privity was necessary, except such as was created by the unlawful act, and the consequencial injury. (See, also, Gerhard v. Bates, 20 Eng. L. & Eqt. 129.) In Thomas v. Winchester (6 N. Y. 397), the action was for negligence, charging the Defendant with carelessness in labelling a deadly poison as a harmless medicine, and sending it so labelled into market. The poison was sold by the Defendant to Aspinwall, and by Aspinwall to Foord, and by the latter to Thomas, the Plaintiff, who administered it to his wife. The objection was taken that the action could not be sustained, as the Defendant was a remote vendor of the article; and thre was no connection, transaction, or privity between him and the Plaintiff, or either of them. The objection was not sustained, and it was held that the Defendant was liable for improperly and negligently labelling the poison as a harmless medicine and sending it forth into market so labelled.

The Defendant would have been none the less liable if the illegal act had been intentional and wilful, instead of negligent merely. It necessarily follows, from the doctrine established by the above cases, that the Defendants, having issued the false certificates of stock, authenticated by them as genuine, and cast them upon the market with fraudulent intent, are liable to every holder to whose hands they may come by fair purchase. The learned Judge was right, therefore, in refusing to charge as requested. We are cited to the case of Seizer v. Mali (32 Barb. 76), as an authority against the theory adopted by the judge at the Circuit. It will be seen, however, from the views above expressed, that the principles recognized in Seizer v. Mali are not here at all impugned. But we are of the opinion that they were not there well applied. The same question was discussed in Cazeaux v. Mali (25 Barb. 578), by Mr. Justice Mitchell, whose views and conclusions are approved.

The judgment should be affirmed.

All concurring in the above opinion except HUNT, J., who dissented, and PARKER, J., who passed no opinion.

Affirmed.

JOEL TIFFANY,
State Reporter.

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MABEL REYNOLDS, RESPONDENT, v. SCHUYLER REYNOLDS, APPELLANT.

Condonation—Cruel Treatment—Cohabitation.

In an action for a separation from bed and board on account of cruel and inhuman treatment, the fact of continued cohabitation after the acts complained of, is not conclusive evidence of condonation or forgiveness, as in cases where the cause is adultery.

PARKER, J.—This is an action for a separation from bed and board forever on the ground of cruel and inhuman treatment.

The Defendant in his answer denied the cruel and inhuman treatment alleged in the complaint, and set up that after the alleged committing of the several acts complained of, the Plaintiff had, from October, 1857, to April, 1858, continued voluntarily to cohabit with him. The referee found that Defendant had been guilty of cruel and inhuman treatment of the Plaintiff, and of such conduct toward her as to render it unsafe and improper for her to cohabit with him, and that said treatment and conduct had not been forgiven by the Plaintiff, and that the Plaintiff is entitled to judgment decreeing that the Plaintiff and Defendant be separated from bed and board forever.

These findings are fully warranted by the evidence of specific acts of cruelty and inhuman treatment, and of the circumstances under which the Plaintiff continued to cohabit with the Defendant after the last act of cruelty proved. Such continuance is not in this case, as it would have been in an action for divorce on the ground of adultry, conclusively of the fact of condonation. In that case the statute makes it so, but not in this (2 R. S. 145, § 42, 1st ed.; Johnson v. Johnson, 4 Paige,

Divorce—Limited—Condonation of offense. 21 *Misc.* 380 (47 *N. Y. Supp.* 738).

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460; S. C. 14 Wend, 637; Whispell *v.* Whispell, 4 Barb. 217; 2 R. S. 147).

As the case stands now, therefore, the conclusion of the referee that the Plaintiff is entitled to judgment is unimpeachable.

The exceptions taken upon the trial, from the report of the case before the General Term of the Supreme Court, appear not to have been there presented. They were all except one, which was grounded upon a refusal to nonsuit the Plaintiff, taken to the admission of evidence. The evidence objected to was, in each case, so clearly competent, that the Defendant's counsel did well to abandon them then as they do their whole case here, by failing to appear either to argue or submit their case. The judgment appealed from it right, and should be affirmed, with costs, and an award of ten per cent. upon the amount of the judgment, as damages for the delay produced by the appeal.

All affirm.

JOEL TIFFANY,
State Reporter.

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THOMAS CLARK, RESPONDENT, v. THE EIGHTH AVENUE R. R. CO., APPELLANT.

Railroad Company—Negligence—Riding on Platform.

The law requires of those engaged in the carrying of passengers, the exercise of such care on their part, and the part of their servants, as will ensure the safe carriage of such passengers, so far as their safety depends upon the diligence and care of those engaged in such business.

A passenger standing upon the front platform of a street railroad car, because of the crowded condition of the car, and paying his fare at the request of the conductor, is not to be deemed guilty of negligence for occupying such position.

The Defendant, a railroad corporation, was engaged in 1856 in carrying passengers in cars propelled by horse-power in the streets of New York.

In the fall of that year the Plaintiff went on board of one of the Defendant's cars for the purpose of being carried therein, and, while standing on the step of the front platform of the car, was knocked therefrom by a horse and cart coming in con-

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Carriers—Contributory negligence—Question of fact. 108 *N. Y.* 641 (1 *Silv. Ct. App.* 580; 13 *St. Rep.* 645; 28 *Week. Dig.* 213); 92 *Hun,* 142 (71 *St. Rep.* 148; 36 *N. Y. Supp.* 678); 90 *Hun,* 142, 70 *St. Rep.* 623; 35 *N. Y. Supp.* 919); 92 *Hun,* 147 (71 *St. Rep.* 152; 36 *N. Y. Supp.* 382); 8 *Hun,* 498; 5 *App. Div.* 493 (38 *N. Y. Supp.* 1078); 7 *App. Div.* 315 (40 *N. Y. Supp.* 95); *D.* 23 *App. Div.* 443 (48 *N. Y. Supp.* 331); 16 *Misc.* 163 (38 *N. Y.* 836); 11 *Abb. N. S.* 413.

Negligence—Joint tort feasors—Liability. 8 *Abb. N. S.* 210; 1 *Sweeney,* 573.

Carriers—Passengers—Contributory negligence. 67 *N. Y.* 55; 67 *N. Y.* 597; 87 *N. Y.* 66; 114 *N. Y.* 108 (22 *St. Rep.* 675); 114 *N. Y.* 612, (20 *St. Rep.* 566); 169 *N. Y.* 128; 173 *N. Y.* 570; 29 *Hun,* 52; 78 *Hun,* 16, 60 *St. Rep.* 799; (29 *N. Y. Supp.* 246); 89 *App. Div.* 339 (85 *N. Y. Supp.* 959); 89 *App. Div.* 427 (85 *N. Y. Supp.* 962); *D.* 89 *App. Div.* 432, 85 *N. Y. Supp.* 965); 42 *How. Pr.* 291; 6 *Rob.* 297; 33 *Super. Ct.* 395; 1 *Sweeney,* 301, 498, 46 *Super. Ct.* 652; 51 *Super. Ct.* 31.

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tact with him, by which he received some injury. The cause was tried at the Circuit in New York by jury.

Upon the trial an exception was taken by the Defendant to a refusal of a nonsuit by the Court, and several exceptions taken by the Defendant to the charge of the Judge as given, and to his refusal to charge as requested, which, together with the facts, sufficiently appear in the opinion. The jury rendered a verdict for the Plaintiff, upon which judgment was entered, and after affirmance upon appeal by the General Term the Defendant appealed to this Court.

A. J. Parker for Respondent.

J. W. Ashmead for Appellant.

GROVER, J.—The Defendant's counsel, at the close of the Plaintiff's case, moved for a nonsuit upon the grounds that the Plaintiff had failed to show that the injury was received without negligence on his part contributing thereto; also that the evidence showed that his negligence did so contribute, and upon the further ground that the evidence failed to show any negligence in the Defendant or its servants. The negligence alleged against the Plaintiff was that at the time of receiving the injury he was standing on the steps of the front platform of the car; it appearing that he would have escaped the injury had he been either inside of the car or upon the platform.

In the absence of any explanation, I should have no hesitation in saying that this position of the Plaintiff at the time of the injury proved that he was negligent, and that it would have been the duty of the Court to nonsuit. When it appears that a passenger is riding upon a car in a place of hazard or danger, his negligence is prima facit proved, and the onus is upon him to rebut the presumption. The proof of the Plaintiff in the present case tended to show that the inside of the car was full, and that the platform was full so that no more persons could stand thereon; that in this situation the car was stopped for the Plaintiff to get on; that upon getting on there was no place for him except standing on the steps; that while riding in this situation the conductor called upon him for and received from him his fare. These facts, if true, authorized the jury to find that the Plaintiff had been invited, by those having charge of

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the car, to ride in that place, and that an implied assurance had been by them given that that was a suitable, safe place for him to ride. Under such a state of facts, I do not think that negligence can fairly be imputed to the Plaintiff for riding in that position. The motion, so far as based upon this ground, was properly denied.

The proof as to Defendant's negligence was, that there was a horse and cart on or near the track, the horse more or less unmanageable, in plain view of the driver of the car, who could have stopped his car in two feet, but did not stop and continued to drive on toward the horse upon a trot until the horse started on toward the car and passed it, bringing either the horse or the cart in collision with the Plaintiff, knocking him from the car on to the pavement, thus producing the injury, the car not stopping until the driver was told that a man had been knocked off. I cannot say as a question of law that this was not negligence. The car must keep on the rails and could not turn off and thus get out of the way like a common vehicle. Thus situated, to drive up to the immediate vicinity of a fractious horse, not controllable by its driver, attached to a cart, was certainly not so entirely free from danger as to justify a court in withdrawing its consideration from a jury. A minute's further time might have enabled the driver to regain control of the horse, and thus have avoided the injury. The motion for nonsuit was, therefore, properly denied. The Defendant gave evidence conflicting with that of the Plaintiff as to stopping the car and receiving the fare from the Plaintiff, after which he renewed his motion for nonsuit, and upon its denial excepted. As to this exception, it is only necessary to say that the legal question was not at all varied by the Defendant's evidence; it only created a conflict of testimony which was proper to submit to the jury.

The Court among other things charged the jury, that the Defendant and its servants were bound to use great care and caution in carrying the Plaintiff, and if free from negligence himself, and injured from want of great care by the Defendant or its servants, he was entitled to recover. The Defendant excepted to this portion of the charge.

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This presents the question as to the degree of care a carrier of persons is bound to exercise. The rule on this subject is so well settled that further discussion or the citation of authorities is deemed superfluous. The law requires from those so engaged the exercise of such care on their part and of their servants as will ensure the safe carriage of their passengers, so far as their safety depends upon the diligence and care of those engaged in such carriage, and makes them responsible for any injury sustained from the omission of such care and diligence. It is not a legal error to call this great care, although the expression is not well calculated to convey to the mind of a jury an accurate idea of what care and diligence is required in the transportation of persons. The charge that, if the injury was the result of the combined negligence of the Defendant and cartman, there being no fault in the Plaintiff, he was entitled to recover, was not erroneous.

If the negligence of the Defendant contributed to the injury, it is no defence that the negligent act of another contributed thereto, if the injury would not have occurred but for the negligence of the Defendant. The Defendant, it is manifest, is only made responsible for the result of his own wrong. That wrong produced the injury, and although it would not have occurred but for the wrongful act of another, that circumstance furnishes no excuse for the Defendant so far as an injured party is concerned.

The Court further charged that if the Plaintiff was permitted by Defendant's agents to ride on the forward platform of the car (step, meaning), he was guilty of no negligence in being there. To this portion of the charge Defendant's counsel excepted. Were not this portion of the charge modified by a subsequent portion, I think the exception was well taken. It is the duty of the passenger on getting on board of a car to place himself in a safe position therein, if he is able to obtain such position, and it is no excuse for him to place himself in an unsafe one, that the persons in charge know that he is unsafe and do not drive him therefrom, when the unsafety is known to the passenger. That riding upon the steps of a

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street-car is less safe than a seat inside requires no proof. It is obviously so.

In a subsequent portion of the charge the judge told the jury, that if the Plaintiff made reasonable exertions to get inside of the car and failed to do so, and was permitted by the driver and conductor to remain on the platform, he was not legally there. I understand this portion of the charge as relating to the facts as claimed by the Plaintiff, that is, that the conductor assented to his riding there, by receiving fare from him therefor when it was impossible for him to get any other place. So understood, it gave a correct view of the law to the jury. I have examined the other exceptions to the charge, and refusals to charge, and come to the conclusion that none of them were well taken and require no discussion.

The judgment appealed from should be affirmed.

All concurred except DAVIES, not voting.

Affirmed.

JOEL TIFFANY,
State Reporter.

THE PEOPLE EX REL. ERNEST FIEDLER, APPELLANT, v. JAMES MEAD, SUPERVISOR, &C., RESPONDENTS.

Assent of Town Taxpayers to Bonds—Laws 1852, *ch.* 375.

The affidavit filed with the clerk pursuant to the 2d Section of Ch. 375 of Laws of 1852, is not to be taken as evidence of the assent of the tax-payers of the town, required by the act, in favor of a bonâ fide holder of bonds issued under its provisions.

And when it is found by the Court that the necessary assent of the tax-payers was not given, the bonds issued possess no validity.

T. R. Strong for Appellant.

D. Pratt for Respondents.

DAVIES, Ch.J.—This is an appeal from the judgment of the General Term affirming a judgment of the Special Term denying a writ of mandamus. The alternative writ was issued in September, 1856, and the issues of fact formed was tried at

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the Cayuga Circuit in January, 1858, before Mr. Justice Welles, who directed judgment for the Plaintiff.

This judgment was affirmed at the General Term, but on appeal to this Court was reversed.

The cause was re-tried at the Cayuga Circuit in 1863, before Mr. Justice Welles, without a jury, and the Justice rendered judgment in favor of the Defendants, which on appeal was affirmed at the General Term, and the relator now appeals to this Court. The case of Starin *v.* The Town of Genoa (23 N. Y. Rep. 439), and the decision of this case by this Court (24 N. Y. 114), definitely settled that no action could be maintained upon these bonds against the town issuing them, even by a bona fide holder. A contrary ruling has been made by the Supreme Court of the United States, and it has held that these bonds, in the hands of a bona fide holder, are legal and valid obligations of the town issuing them, and can be enforced. We must adhere to the law as laid down by this Court in the two cases referred to, and therefore hold that this Plaintiff cannot enforce these obligations aganst the town. A majority of this Court, on the previous hearing of this case, held that the writ of mandamus asked for by this relator, to compel these Defendants to apply to the County Treasurer of the County of Cayuga for the moneys received by him and in his hands, levied and collected for the purpose of paying the interest upon the bonds issued by the town of Genoa, ought not to have been issued. The judgment of the Supreme Court awarding the writ was reversed by this Court, on the ground that it was not shown that two-thirds of the resident taxpayers of the town had signed the written assent to the issuing of the bonds, as required by the act authorizing such issue, and that the affidavit relied upon did not supply that effect of proof.

The judge who tried this action the second time has found as facts, that the written assent of two-thirds of the resident persons taxed in said town of Genoa, as appearing on the assessment roll of said town made next previous to the transfer of said alleged bonds of the said railroad company, as aforesaid, has never been obtained by the said Supervisor and Com-

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missioners, or either of them, nor by any other person or persons, corporation or body politic, in their behalf, or in behalf of any one or more of them, to the effect that such Supervisor and Commissioners had power to do the act authorized by said act of the Legislature, therin referred to, as provided in and by the first section thereof; and that the written assent of two-thirds of the resident persons taxed in said town has never been obtained by any Supervisor and Commissioners of said town of Genoa, or by any or either of them, nor by any other person or persons, corporation or body politic, in their behalf or the behalf of any or either of them, as provided and contemplated by the said first section of said act.

That before said alleged interest warrants or coupons became due, as hereinbefore stated, a sum of money equal to and sufficient to pay the same, when they should become due and payable respectively as aforesaid, had been levied and collected, as in said writ is stated and set forth, but against the report of the Supervisor of said town of Genoa, and against his vote, and the same had been paid to the Treasurer of the County of Cayuga, for the purpose of paying the said interest warrants or coupons so becoming due and payable on the first days of January and July, 1856; and that the said Defendants, although often requested so to do, have hitherto and still do refuse to receive the said moneys from the said County Treasurer, or to pay the same or any part thereof to the said relator, or to cause or to allow the same to be paid; and the said County Treasurer still holds the said last-mentioned moneys, and is ready to pay the same to the said Defendants upon request and upon receiving a proper voucher or vouchers for said payment.

The facts now found by the Court in the re-trial of this action, are certainly not more favorable to the relator than those before this Court on the former hearing. It may with truth be said, that in all essential particulars they are identical.

We do not think it seemly to review and reverse the former judgment of this Court in this action, upon the same facts. This Court solemnly adjudicated, that a mandamus had been

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improperly awarded by the Supreme Court to these Defendants.

We are now asked to do the same thing which was then refused, upon the same state of facts, which, if done, would be a reversal of the previous judgment of this Court in this transaction. We cannot do this. It is claimed that we should now award this writ, to harmonize or conform to the decision of this Court in Murdock *v.* Aikin and Ross *v.* Curtiss (31 N. Y. 606), decided since this case was before this Court on the previous occasion. An examination of the opinions in these cases will show that there is nothing in them conflicting with the cases of Starin *v.* Town of Genoa, and the judgment of this Court in this action. The cases in 31 N. Y. were actions against certain officers who had received moneys and had the sums in hand, for the purpose of paying the interest due on certain coupons held by the Plaintiffs in these actions.

It was said in Murdock *v.* Aikin, that the Defendant in that action had received the sum of money claimed for a specific purpose, named to pay the interest due, or to become due, to those holding the bonds of the town. If the town thought proper, as it did, through the instrumentality of the law and by the collection and payment of this money to the Defendants in that suit, to concede its liability to pay this interest money, it was not for them to set up that such action on he part of the town was illegal, and that the bonds so issued by the town were illegal and void. This was not a question which those Defendants were in a position to agitate. It was competent for the town to pay the interest on the bonds, although their collections could not have been enforced at law, and the trustee who had received the money for such purpose, could set up that the debt was illegal. In Ross *v.* Curtiss, it was said that it was idle for the Defendant to say that he had a right to exercise any discretion whether he will pay the money or not, or to inquire whether the Board of Supervisors of the county had legally raised the money, or whether the bonds were legally issued. That was no part of his duty. The statute directed him absolutely to pay the money to the holders of the bonds issued by the towns, for the interest which should then have accrued.

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He had nothing else to do but to pay the same in the manner directed. If so, his only duty was to ascertain who were the real owners of the bonds issued, and to pay to them the money so placed in his hands for that purpose. That was the extent of his authority; and when he undertook to review the legality of the acts of the Board of Supervisors in raising the money, or of the officers authorized to issue the bonds, he exceeded his powers, and assumed to do acts for which he had no authority. An agent has never a right to review the legality of acts done by his principal; but where he receives money to apply as directed by the principal, he has no other duty but to comply with such orders. It was claimed on the argument of Ross *v.* Curtiss that this case differed from that of Murdock *v.* Aikin. The answer to this suggestion was, that that case was an application for a mandamus to compel the officers, who had money raised by tax, to pay the same to the object for which it was provided, and the decision of the Court was that a mandamus was a proper remedy. The question which were decided in Murdock *v.* Aikin, and in Ross *v.* Curtiss, did not properly arise in The People *v.* Mead. The latter case was decided in the same manner as if the action had been against the town, and the same ruling adopted as in the case of Starin *v.* Town *of* Genoa, and Gould *v.* Town of Sterling, and the decision of this Court in Ross *v.* Curtiss was put distinctly on the ground that the Defendant in that action had no right to litigate the question which arose in this action, and in the two cases above referred to, reported in 23 N. Y. Rep. The liability of the Defendant was put solely on the ground that "he received the money under the statute for the sole purpose of paying this interest, and he has no power to avoid the discharge of that duty by alleging illegality in the acts of the body from which he receives the money and authority to pay it."

This examination of these cases shows that there is no conflict in the views expressed in them, or the points adjudicated therein, and that this Court has so held and declared. It is thus seen that the two cases decided by this Court, since this present action was under review by it, announce no new doc-

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trine, or any new principle that confiicts with the opinions there expressed.

We see, therefore, no reason for a departure from the views then enunciated, and it follows that the judgment of the Supreme Court now appealed from, being in harmony with the opinion of this Court, should be affirmed with costs.

GROVER, J.—It was not contended upon the argument but that a mandamus was the appropriate remedy in this case, if the Plaintiff was entitled to any. That is too plain for discussnon. But for the previous adjudications of this Court, I should have held that the affidavit filed with the clerk of Cayuga County, pursuant to the second section of chapter 375 of Laws of 1852, was conclusive evidence of the assent of the taxpayers of the town, required by the act in favor of a bona fide holder of bonds issued under its provisions. But those decisions have settled the law of this State otherwise. (Starin *v.* The Town of Genoa, 23 N. Y. 439; The People *ex rel.* Fiedler *v.* Mead, 24 N. Y. 114.) The affidavit must, in accordance with these decisions, be regarded as furnishing no evidence upon that point. The finding of the judge, that an assent of two-thirds in number of the taxpayers was not given, was correct, as this fact was not proved by evidence other than the affidavits. The bonds must be held to have been issued without any power, and therefore as possessing no validity. These conclusions are the necessary result of the cases cited *supra.* The relator has no legal demand against the town, nor any title to the money in the county treasury, which by this proceeding he is endeavoring to reach. I do not, therefore, see upon what ground he is able by mandamus to compel the officers of the town to do acts to enable him to obtain money belonging to the town, to which he has no claim. If he can compel in that way these officers to go to the County Treasurer, and get the money and pay it over to him, I do not see why he might not, in the same way compel the Board of Supervisors to levy the tax upon the town, necessary to pay not only his interest but the principal. These Defendants owe no duty to the Plaintiff, because he has no title to the money.

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It is insisted that Ross *v.* Curtiss (31 N. Y. 606), and Murdock *v.* Aikin, decided by this Court, not reported, show that the Plaintiff is entitled to the money raised by the town, for the purpose of paying the interest upon the Plaintiff's bonds. These were actions brought by the holders of bonds against the officers of the town, to recover money in their hands which they had received for the express purpose of paying the same to the Plaintiffs to be applied thereon.

Judgment in each case was given for the Plaintiff, upon the plain familiar principle, that an agent or trustee, receiving money to be paid over to his principle or *cestui que trust,* is not permitted to dispute the right of the party for whose benefit he received it; and cases establishing this doctrine were cited by the Court. But this does not show that the Court, by mandamus, at the suit of a party having no right, will compel an officer to go and demand and receive from another officer money, and pay the same over to him. The plain answer is, you have no right to the money, and therefore the Defendant owes no duty to you to perform these acts. In Elmore *v.* Ross the Plaintiff proved a good title to the money by showing it in the Defendant's hands, and that it was received by the latter in trust to pay it to him. This established his right as against the Defendant. It became necessary to prove the bonds only for the purpose of showing that the Defendant received the money in trust to pay the Plaintiff. It was wholly immaterial whether the bonds were or were not valid. Not so in this case. The bonds and the coupons are the foundation of the Plaintiff's claim, and these being invalid, his rights fails, and he having no right to any money, has no right to a mandamus to compel anybody to do any act to enable him to obtain it.

It is said, if the town does not dispute the Plaintiff's title no one else can. The town has no power to recognize these bonds, or in any manner to raise money to pay them. The bonds being invalid, the Plaintiff is in the same position he would be if he had no bonds at all, and the money was raised as a donation for him. In such a case, I apprehend no one would insist that a mandamus would lie to compel officers to do acts to enable

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the Plaintiff to get the money. The Legislature can, and probably will, relieve the Plaintiff and others similarly situated upon equitable terms; but I am unable to see how the Courts can furnish a remedy without a violation of principle. The judgment from should be affirmed.

All concur. Affirmed.

JOEL TIFFANY,
State Reporter.

PORTER, J., takes no part in the case.

THE N. Y. & N. H. R. R. CO. *v.* MORRIS KETCHUM & EDWARD BEMENT, SURVIVORS.

Appeal—Pleadings—When determined sufficient.

When a case has been in this Court on appeal and has been sent back to the Special Term for a new trial, this Court must necessarily have determined the pleadings to have been sufficient to sustain a judgment.

When the judgment has been reversed because the Court below improperly denied the ruling asked, it necessarily follows that the Court deemed the pleadings to be sufficient to entitle the party to the ruling sought.

BOCKES, J.—After a careful examination of the case, I am satisfied that this appeal presents no question for our consideration not fully determined by this Court when the case was here on the former appeal (34 N. Y. 30).

It must necessarily have been then determined that the pleadings were sufficient to authorize the judgment in favor of Ketchum, Rogers & Bement, to which it was found they were entitled, or the case would not have been sent back to the Special Term for re-trial. The judgment was reversed as to those Defendants, and a new trial was granted them, for the reason that they had been improperly denied affirmative relief. If the pleadings were insufficient to authorize it, such relief could not have been improperly denied them, and the judgment should have been affirmed.

But the Court came to the conclusion, and held that, under

Appeal—From order—When allowed. 47 *N. Y.* 46.
Stare decis. 63 *Barb.* 294.

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the pleadings and proofs, the Defendants, Ketchum, Rogers & Bement, were entitled to affirmative relief.

The question as to the sufficiency of the pleadings was therefore settled by that adjudication, and is not now open for discussion.

So, also, it was adjudicated on the former appeal, that the fact that Morris Ketchum, one of the firm of Ketchum, Rogers & Bement, was a director in the N. Y. & N. H. R. R. Co., did not deprive the firm of the right to recover against the company by reason of its negligence. This precise question was presented on the former appeal, and was carefully considered by the Court, as appears by the elaborate opinion of Mr. Justice Davis, whose views were concurred in and adopted by a majority of his associates.

He says: "It seems that the Court below denied all remedy to the firm (consisting of Ketchum, Rogers & Bement), on the ground that Ketchum, one of the firm, was a director of the corporation during the entire period of the frauds committed by the transfer agent, and was therefore in some sense chargeable with the consequences, because of the neglect of the board of directors."

He then proceeds to a discussion of the question, and closes by saying:

"In my opinion it was error to refuse relief to this firm on the ground above indicated."

Thus it appears that the reversal of the judgment was put on the express ground that the Supreme Court committed an error in holding that Ketchum's directorship in the company bound the claim of the firm of which he was a member. No new facts were elicited on the re-trial to change the case.

It stands now as it stood when here before, in every material particular. If any question was settled by the adjudication on the former appeal, it was this: and if the rule of *stare decisis* is of any value, it should be adhered to in this case, when the precise question is again presented, in the same Court, between the same parties, and substantially on the same state of facts.

I regard every question which can be raised on this appeal

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definitely settled in favor of the Respondent by the former adjudication. The reasoning of the learned judge who gave expression to the views of the Court is conclusive and exhausting. Its completeness should not be marred by any attempt to add suggestions by way of argument or illustration.

The judgment must be affirmed with costs.

All the Judges concurred except PORTER, J., who having been counsel in the case expressed no opinion.

All affirm.

JOEL TIFFANY,
State Reporter.

THE PEOPLE, EX. REL. PETER CAGGER, v. THOMAS DOLAN, AND OTHERS, ASSESSORS OF THE CITY OF ALBANY.

Assessment on Bank Stock—No reduction for Debts—Laws 1866, *ch.* 761.

A shareholder in a banking association who has been assessed upon the value of his shares therein under the Act of 1866 (Ch. 761), is not entitled at the hands of the assessor to a reduction of such valuation on account of his debts.

THIS is an appeal from an order of the General Term of the Third District, commanding the Appellants as assessors of the city of Albany, to reduce the assessment against the relator to the sum of one dollar, in accordance with the request contained in his affidavit. The facts are stated in the opinion of the Court.

A. J. Parker for the Appellants

Samuel Hand for the Respondents.

HUNT, J.—The relator resides in the Sixth Ward of the city of Albany. The National Commercial Bank, in which he owns eleven hundred and four shares of stock of the value of $20 each, is located in the Fourth Ward of the same city. Under the Act of the legislature of this State, passed April 23, 1866, the relator was assessed $22,800 as the par valuation of his bank shares. The Defendants are the board of assessors of the city of Albany.

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On the 24th of September, 1866, the relator presented to the said Defendants an affidavit, in which he stated "that the value of the personal estate owned by him does not exceed the sum of one dollar, after deducting his just debts and his property invested in the stocks of the corporation, liable to be taxed therefor," and claimed that his assessment should be reduced in accordance therewith.

The Defendants refused to reduce the assessment, and the relator moved at Special Term for a mandamus directing them to make such reduction. This motion was granted, and upon appeal by the Defendants to the General Term of the Third District, the order was affirmed. The Defendants now bring their appeal to this Court.

The Respondents claim that the assessment and taxation upon bank shares, authorized by the Act of April 23, 1866, stand upon the same basis as all other taxation of personal property, under the laws of this State; that the relator was entitled to deduct from such assessment his personal indebtedness, and that he was subject to taxation upon the balance only. The Appellants claim that there was intended to be established a distinct system of taxation in reference to shares of bank stock, by which they were to be assessed and taxed upon their actual value, independent of the condition or circumstances of the owner.

By the general tax law of the State each individual is assessable in the town or ward in which he resides, and not elsewhere, for all personal estate owned by him. The assessors of each town, between the first days of May and July, are required to ascertain by diligent inquiry the names of the taxable inhabitants, and the taxable property, real or personal, in their respective towns. In the fourth column of the assessment roll, to be prepared by them, it is directed that the assessors shall set down "the full value of all the taxable personal property owned by each person, after deducting the just debts owing by him" (1 R. S., 1st Ed., 391). It is the duty of the assessors to meet at a time appointed to hear complaints, and make corrections of their rolls. It was at the time thus appointed that the

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relator made the affidavit before set forth, and it is conceded that, in regard to taxation for personal property generally, it was sufficient to entitle him to the deduction claimed.

The legislation upon the subject of the taxation of banks has been heretofore regulated upon a plan by itself, and a reference to this system will aid us in reaching a correct conclusion upon the question before us. The general system of legislation upon the subject-matter of a statute may be taken into view, to aid the construction of a particular statute relating to the same subject. (Holbrook *v.* Holbrook, 1 Pick. 248, 254; Mendon *v.* County of Worcester, 10 Pick. 241.)

The first statute of which I am aware that imposed a tax upon bank stock as such, was that of 1823 (Sess. Laws, 1823, p. 390), which enacted "that all goods, chattels, bonds, . . . bank stock, . . . shall be subject to taxation under the meaning of this act." By section fourteen the officers were required to deliver to the assessors a statement of their real estate, and the amount of their capital stock paid in or secured to be paid in, and the assessors were directed to insert in the roll "the amount of such real and personal property." It was further provided, that it should be the duty of the cashier or treasurer to pay the amount of such tax, "and to deduct the same from the dividends of the stockholders, in proportion to the stock held by them respectively, except the stock held by the State, or by literary or charitable institutions, from which no deductions shall be made" (§ 15). The companies were further authorized to commute for such taxes, by the payment of ten per cent. upon the amount of their dividends or income. The imposition of this tax was made upon the recommendation of the then Comptroller of the State, and was the subject of complaint on the part of the banks. It continued, however, to be the law of the State until the adoption of the Revised Statutes.

By the Revised Statutes of 1828 it was provided that "all moneyed or stock corporations, deriving an income or profit from their capital or otherwise," should be liable to taxation on their capital (1 R. S., 1st Ed., 414). The assessment of such corporations was made, 1, upon the real estate owned by them, if any; and 2, upon the capital stock actually paid in and

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secured to be paid in, excepting therefrom the sums paid for real estate, and the amount of such capital stock held by the State, and by any incorporated literary or charitable institutions. The Safety Fund Banking System, which came into operation in the year 1829, required that the capital of all banks should be fully paid in. At this time, then, banks as such were taxable upon the amount of their capital stock paid in, with the two exceptions stated, to wit, of stock held by the State, and by literary' or charitable institutions. It was thus taxable whatever might be the diminished value of its shares, unless it was able to show that it was not in the receipt of any income or profit whatever (Ib. 416). So, on the other hand, it was subject to no greater taxation, however valuable its shares might become. (Bank of Utica v. The City of Utica, 4 Paige, 399.) Its nominal capital was the standard of taxation, although its shares might be reduced below that value, or might be greatly above it.

By the act of Dec. 7, 1847 (4 R. S., Edm. Ed., 151), it was enacted that all individual bankers and all banking associations "shall be subject to taxation on the full amount of actual capital paid in or secured to be paid in, as such capital, by them severally, at the actual market value of such securities, to be estimated by the Comptroller, without any reduction for the debts of such individual bankers or banking association."

It was also enacted that taxes upon incorporated companies should be demanded from the president of the company, and that the same should "be paid out of the funds of the company, and be ratably deducted from the dividends of those stockholders whose stock was taxed, or shall be charged upon such stock if no dividends be afterward declared" (1 R. S., Edm. Ed., 377, § 18.)

In the year 1853 the system was amended by providing that the assessment upon incorporated companies should be upon their real estate, upon the amount of their capital stock paid in or secured to be paid in, together with the amount of all surplus or reserved funds exceeding ten per cent. of their capital, but deducting, as before, the amount of said stock that should

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be held by the State, or by any literary or charitable institution (1 R. S., Edm. Ed., 375).

And again, in the year 1857 (Sess. Laws, 1857, 2d vol., p. 1), the legislature enacted that this assessment, with the exceptions aforesaid, should be upon the capital stock, together with its surplus profits exceeding ten per cent., "at its actual value," thus substituting the principle of ascertaining the value of the stock to be assessed, instead of taxing upon its nominal amount.

The law contiued in this form without alteration, with the exception of the invalid law of 1864, hereafter noticed, until the year 1865. The National Bank system had then become established, and the State Banks were rapidly organizing themselves under that authority. The legislature in that year passed an act (Laws 1865, ch. 97, p. 172) providing for such transfers, legalizing and facilitating them. In section ten of the act, they enacted that all the shares in any of the said banking associations, held by any person or body corporate, should be included in the valuation of the personal property of such person or body corporate in the assessment of taxes in the town or ward where such banking association is located, and not elsewhere. This act having been declared by the Supreme Court of the United States to be illegal on a ground not here material, another act was passed by the legislature of New York on the 23d day of April, 1866, Laws 1866, p. 1647, being the act under which the present question arises. By the first section of this act it is provided that hereafter, no tax shall be assessed upon the capital of any bank . . . but the stockholders in such bank shall be assessed and taxed on the value of their shares of stock therein. The assessment is to be made in the place where the bank is located, and not elsewhere, and the proportionate value of the real estate of the bank is to be deducted from the stock of each shareholder.

We thus see that, for a period of nearly fifty years, the policy of the legislature in regard to the taxation of bank capital and bank shares has been uniform. The stock has been taxed at its nominal value, without deduction for debts or charge for surplus, or as more recently at its actual value. We see that

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as to individual bankers, it was expressly enacted that the capital employed by them should be taxed at the market value of their securities employed, and with out deduction for their individual debts. We see, again, that the taxation of the capital was considered as the taxation of the shares, when the legislature enact that such taxes shall be deducted from the dividends of the shareholders, or be charged against dividends subsequently to be made. In all of these statutes the assessment and taxation was based upon the value of the stock of the incorporation. The debts and credits and actual funds of the bank established the subject of taxation, and the condition or circumstances of the individual owning the shares did not enter into the account. We come then to the inquiry whether, under the acts of 1865 and 1866, the same system is carried out, and the shares are to be assessed and taxed at their value, without regard to the condition of the owner, or whether that system was then abandoned.

It will be borne in mind that the present question is upon the intention of the legislature, and not upon its power. The power of the legislature to say that the taxation shall be enforced, without regard to the circumstances of the owner, is not disputed. Prior to the organization of the National banking system, the State banks paying taxes upon their capital to the State and to the municipal authorities possessed an aggregate capital of more than a hundred millions of dollars. Nearly all of these banks have transferred themselves to the United States organization. The State possesses the same power of taxation upon the shareholders (with certain qualifications not here important to be noticed) that it formerly had upon the banks; it has exercised this power, has preserved the forms and manner of bank taxation, so far as they were appropriate, and has given no evidence of any intention to abandon the large field of taxation so long used by it, or to embarrass and reduce it by allowing the circumstances of the shareholders to form an element in the case. The statute, on the other hand, apparently intends to preserve as fully as possible all the connections before existing on this subject. It says that "no tax shall hereafter be assessed upon the capital of any bank, or

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banking association, organized under the authority of this State or of the United States; but the stockholders in such banks and baking associations shall be assessed and taxed on the value of their shares of stock therein." It is quite unusual for the legislature to enact what they do not intend to tax, or what they do not intend to do in any respect. The preliminary statement, as here embodied, shows that the legislature wished to preserve the connection and the identity, as far as possible, between these two subjects of taxation. It is as if they had said, We cannot now tax the National banks, as we have been accustomed to do, but instead thereof we will tax their shareholders, and apply to them the system of taxation that we have heretofore imposed upon the banks, so far as it is lawful to do so. If such had not been their intention, it would have been very easy to have said that shares in banks shall be taxed like other personal property, in the same manner and subject to the same rules. On the contrary, they adopt a special system of taxation for these shares, in close resemblance to the mode of taxing bank capital, and declare that such shareholders shall be "assessed and taxed on the value of their shares." In the general statute which I have before quoted the assessors are directed to assess to the person named "the full value of all the taxable personal property owned by such person, after deducting the just debts owing by him" (1 R. S., 1st Ed., 391). upon the balance the tax is to be imposed. Under the present statute no such deduction is referred to; but the person is to be "assessed," not only, but "taxed on the value of his shares of stock therein." The difference is significant; the direction to the assessors to deduct from the value of the shares of each person a proportionate sum for the real estate owned by the corporation is significant also. It is so not only upon the principle of *expressio unius,* but as indicating the design of the framers of the statute. No such direction is contained in the general tax law, but real estate is there assessed and taxed in one column, and the residue of personal estate, after deducting debts, in another. By the statute of the United States, the real estate owned by a bank is taxable under the State authority directly against the bank, and the revenue on that subject of

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taxation is obtained as formerly. When the assessment is made upon the shares, the proportionate value of the real estate is deducted, and the State thus obtains from the bank and the shareholder together, as it did before from the bank alone, a tax upon the full value of both its real and its personal estate.

There are still other provisions of this statute which are evidence of the legislative intention to arrange a system of taxation of this kind of property which should be separate from the general system. Thus, by section 5, an action is given to the County Treasurer "to collect the tax from the avails of the sale of his shares of stock, and the tax on the share or shares of said stock shall be and remain a lien thereon, till the payment of said tax." No such provision for sale of choses in action is declared by the general tax law, and no such lien is declared in any other part of the tax law of this State upon the property assessed. The sixth section also contains the unusual provision, that it shall be the duty of the bank to retain so much of the dividends belonging to such stockholders as shall be necessary to pay the taxes assessed in pursuance of this act. No such provision was ever before introduced into the tax law of this State, or now exists under the general system. These unusual provisions and directions concur with the previous legislation in indicating the statutory intent to establish for bank shares a system of taxation peculiar to itself, and independent of the general system of taxation in existence in the State. The act of April, 1863, ch. 240, is also strongly indicative of the same intention. By that act the legislature evidently intended to tax the whole available interest in the bank or in its shares. They there provided that a tax should be laid upon "a valuation equal to the amount of their capital stock paid in," and the surplus earnings, less ten per cent., without any deduction. This act was declared void by the Supreme Court of the United States, as laying a tax on the property of the bank, which property, in the whole or in part, consisted of stocks of the Federal Government. Immediately after this act was declared invalid, the acts of 1865 and 1866, already cited, were passed by the legislature.

It is argued in behalf of the Respondents that, inasmuch as

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the statute directs the assessment of the bank shares to be included in "the valuation of the personal property of such stockholders," it subjects it to the operation of the general law in regard to assessments. It is to be observed, however, that this valuation is directed to be thus made in the ward where the bank is located, and not elsewhere, whether the stockholder reside in said ward or not. It was the case with this relator, as it must be with many others, that he did not reside in the ward where the bank was located. It thus by its terms becomes at once distinguished from the general tax law, which requires this valuation to be made in all cases at the residence of the stockholder; and thus indication is given that this valuation was intended to be a part of the special system which I have already discussed. I have endeavored to show that such was the intention, and the provision is not in conflict with that idea, but forms a consonant portion of the machinery to accomplish it.

It is said that the expression "but not at a greater rate than is assessed upon other moneyed capital in the hands of individuals in this State," aids the argument of the Respondent. It is argued that an individual owning a bond and mortgage for $1,000, and being indebted $500, could by the general law claim to have the $500 deducted from the value of his bond and mortgage, and that his assessment and taxation should be upon the remaining $500 only; and that the refusal of a like deduction in favor of the shareholder of $1,000, would subject him to taxation upon twice as large an amount as was imposed upon the individual. This, it is said, would be imposing a greater rate of taxation upon the shareholder. The "rate" or ratio is the percentage merely, the "proportion," the "degree" (*Webster, Worcester*). If the State imposes a tax of five mills upon the dollar on all the real personal property of the State, five mills on the dollar is the "rate," the degree, the proportion, the percentage of taxation. This is distinct from the question of exemption. Almshouses and institutions of learning, and the estates of clergymen to a limited extent, are exempt from taxation. This exemption may compel the payment of a larger amount by the remaining taxpayers in an indirect

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manner, for the reason that so large a sum does not come into the Treasury of the State as if there were no exemptions. If so, it is not because the rate is altered, but because there is less material upon which the tax may attach itself. Rate and exemption are in no way connected. In their nature they have no necessary relation to each other. The one directs how much shall be raised upon certain valuations, while the other directs what property shall be subject to taxation, and what shall be exempt. The Statute of 1865 was declared invalid, for the reason that it did not contain the limitation now under discussion. The act of Congress authorized the taxation of shares of bank stock, but required that such tax should not exceed the rate imposed upon the shares of stock in banks authorized by State laws. The act of 1866 supplies this omission. To illustrate further the rate and exemption, the possession of United States securites by a State bank exempts so much of its capital as is thus invested from State taxation, but the possession by a National bank of the like securities does not relieve its shareholders to the like amount. Both of these propositions were decided by this Court in The City of Utica *v.* Churchill (33 N. Y. 161); and Van Allen *v.* The Assessors (3 Wallace, 573), before cited; 2 Wallace, 200, Bank tax case; 2 Black, 620. The same question was decided by this Court in October last, in The People, *ex rel.* Kennedy *v.* The Commissioners of taxes, &c. The fact, therefore, that the same percentage will not produce the same amount of tax when imposed upon a State bank with a capital of $1,000,000, that it does when imposed upon National shareholders to that amount, does not affect the legality of the tax, and, as a corollary, does not impose a different rate of taxation. If it imposed a different rate the tax would be invalid.

The case of The People, *ex rel.* Kennedy, *v.* The Commissioners of Taxes, &c., I understand to be decisive against the argument now under consideration. See opinion of Davies, Ch.J., pp. 15, 19, 20. (35 N. Y. 423.)

In Van Allen *v.* The Assessors (*supra*), the Supreme Court of the United States says: "Upon the whole, after the maturest consideration which we have been able to give to this

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case, we are satisfied that the States possess the power to tax the whole of the interest of the shareholder in the shares held by him in these associations, within the limit prescribed by the act authorizing their organization." This proposition was announced in denial of a claim, that the interest of shareholders should be subject to taxation so far only as the capital of the bank was not invested in United States securities, exempt by law from taxation. I think it is correct in its application to the present case. The assessors did right in refusing to make the deduction claimed, and the order appealed from should be reversed with costs.

All the Judges concurred in the foregoing opinion, except Judges PORTER and BOCKES, who dissented.

PARKER, J.—The question presented in this case is, whether a shareholder in a bank or banking association, who has been assessed upon the value of his shares therein pursuant to the act of 1866 (Sess. Laws, 1866, chap. 761), is entitled, at the hands of the assessors, to a reduction of such valuation on account of his debts.

Upon a careful examination of the statute above refrred to, in connection with the other statutes of the State on the subject of taxation, I do not think it contemplates the allowance of any such reduction.

The act itself shows that it was intended as a *substitute* for the then existing mode of assessing and taxing that portion of the property of the State invested in the capital of these moneyed corporations.

It begins as follows: "No tax shall hereafter be assessed upon the capital of any bank or banking association organized under the authority of this State, or of the United States, but the stockholders in such banks and banking associations shall be assessed and taxed on the value of their shares of stock therein; said shares shall be included in the valuation of the personal property of such stockholder in the assessment of taxes at the place, town, or ward where such bank or banking association is located, and not elsewhere, whether the said stockholder reside in said place, town, or ward, or not; but not

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at a greater rate than is assessed upon other moneyed capital in the hands of individuals in this State."

The reason of this substitution, as no one can doubt, is to be found in the fact that, because of the investment of almost the entire banking capital in the State in the bonds and other securities of the United States, this large amount of personal property was escaping taxation (the banks not being taxable upon that portion of their capital so invested), and that by assessing and taxing the shares of stock in the hands of the stockholders (which are taxable), the entire amount might be reached and made to bear its proportional part of the burdens of State taxation.

To regard the act as intended merely to render taxable, against individuals, a species of property never before taxed, and to leave it to be treated, in reference to taxation, like all other taxable personal property, without any reference to the incidents and limitations which affected the taxation of corporations upon their capital, as the Respondent's counsel insists it should be regarded, seems scarcely a correct view to take of it. Such was not, I think, the scope and object of the statute, but, as already intimated, to secure to taxation the entire amount lost by the withdrawal of the capital of the banks therefrom. This is manifested, not only by the history of recent legislation and judicial decision on the subject of bank taxation, but by the provisions of the statute itself. The making of the stock taxable at the place where the bank is located, and requiring the bank to pay the tax from the dividends of the stockholder, if not paid by him, is a strong indication of the object above assigned.

The bank had not the right to reduce the valuation upon which it was taxable, on account of its indebtedness; and there is nothing in the statute under consideration expressly giving the stockholder such right. Reasoning from the plain object of the act, as being, not to reduce the amount of property subject to taxation, but to produce the same amount of taxation in a different way, the inference is that no such right was intended to be given.

It is insisted, however, that the right is, in effect, given by

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the provision that the "shares shall be *included* in the valuation of the personal property of such stockholder in the assessment of taxes," understanding it as a direction to add the value of the shares of stock to the value of all the taxable personal property owned by the stockholder, and then from the aggregate to deduct his debts, as required by the general statute in regard to the assessment of personal property (1 R. S. 391, § 9, sub. 4, 1st. ed.).

This general statute provides (and the special statute for the city of Albany is the same) that the assessors in preparing their assessment roll shall set down, in the fourth column thereof, " the full value of all the taxable personal property owned by such person, *after deducting the just debts* owing by him." What, then, is "the valuation of the personal property of such stockholder in the assessment of taxes," in which the shares are to be included? Not the value of all his taxable personal property *before* the deduction of his debts; but the residue which shall remain after such deduction: "the full value after deducting the just debts." The assessment of the personal property mentioned is necessarily independent of that of the bank shares, for the valuation of the personal property in which they are to be included is not arrived at until after debts are deducted; until all deductions on account of debts have been made, there is to be no including of bank shares in the amount. So that, even if we are to understand by the words, "shall be included in," an adding and aggregating of amounts into one, I do not see any opportunity for deducting debts from the value of the shares of stock, the assessment of which is provided for in this act.

But that provision of the act, it seems to me, was intended merely to indicate that the assessors, in making up their assessment roll, should place the value of the shares in the column in which personal property is placed, so that it shall, in the assessment roll, comprise a part of the personal property there reported; not aggregated with the personal property of the stockholder, but separately placed, so as to show its separate amount, and ultimately, when the fifth column comes to be supplied by the supervisors, the amount of tax with which it is

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separately chargeable. In such way it is embraced or "included" in the valuation of the stockholders' personal property in the assessment of taxes.

It is true there is no specific direction to keep the amount separate in the roll, and yet it is impossible to carry out the other provisions of the law unless that is done; and there is no reason to be drawn from the act, or the other acts relative to assessments against it.

The meaning of the term "included in," insisted upon by the Respondent, cannot be literally followed, for these shares are to be assessed in the place, town, or ward where the bank or banking association is located, without reference to the residence of the stockholder. Unless he resides at the place where the bank is located, he will have no valuation of personal property there to which they can be added; the language must mean that they shall be comprised in the valuation of personal property upon the roll, and assessed to the stockholders, though not a resident.

Again, by the 6th section of the act it is made the duty of the bank to retain, from the dividends of the stockholders, so much as may be necessary to pay the taxes assessed upon his stock pursuant to the act. It is necessary to the performance of this duty that it shall appear what tax has been assessed, distinctively, upon the stock; and hence the necessity of a separate statement of its value by the assessors, and a separate carrying out of the tax by the supervisors. The incongruity of the right claimed with this provision is manifest. If, when the stockholder resides at the place where the bank is located, the stock is to be mixed with his other taxable property, and then his debts deducted, how can it be ascertained what tax remains unpaid upon his stock, so that the bank can pay it, and deduct it from his dividend? If, in the ward where the bank is located, and in which the stockholder does not reside, as in the present case, he has stock assessed, for example, at $5,000, while in his own ward his personal property is assessed at $5,000, and he comes before the assessors, and shows that he is entitled to a deduction for debts to the amount of $7,000, so that the value of the personal estate owned by him, including his stock, after

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deducting his debts, &c., does not exceed $3,000—which assessment is to stand? at which place is he to be taxed upon this amount? The want of any provision on the subject, so plainly necessary if the right claimed exists, indicates a want of intention to recognize and allow it.

The words used in the act to impose the tax are, "but stockholders in such banks and banking associations shall be assessed and *taxed* on the *value* of their shares of stock therein." This language is not consistent with the claim of the Respondent, that they shall be taxed on the value after deducting debts.

The general statute (1 R. S. 389 § 5, 1st ed.) provides that "every person shall be assessed in the town or ward where he resides when the assessment is made, for all *personal estate* owned by him." "Assessed for all personal estate owned by him," is by subdivision 4, of § 9, construed to mean all his "taxable personal property, after deducting the just debts owing by him;" that is, the net personal estate, *what a man is worth,* exclusive of his lands and other property not taxable, is what the general law intends to tax him upon as personal property. The different language used in the act under consideration, is significant of a different intent in regard to this specific kind of property: "shall be assessed and taxed on the value" devotes the whole value to taxation, without reduction for debts, as has ever been the policy of the State in reference to the property which this is made to represent, and in perfect accordance with what we have seen to have been the object of the statute.

The view above taken does not at all conflict with the provision in the act, that the shares shall not be assessed "at a greater rate than is assessed upon other moneyed capital, in the hands of individuals in this State." This clause in the act is adopted from the 41st section of the Act of Congress, passed June 3, 1864, known as the National Currency Act, and inserted for the purpose of conforming the taxation directed by this, to the requirements of that act. The clause in that act has just received a construction in the Supreme Court of the United States, in the case of The People, *ex rel.* Duer, *v.* the Commissioners of Taxes, &c., and is there held to mean "that no greater proportion or percentage of tax on the valuation of

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the shares should be levied, than upon other moneyed taxable capital in the hands of the citizens." This is in accordance with the view of this Court in the same case, as expressed in the opinion of the Court delivered by the Chief Judge. So that the fact that the assessment of this property is not subject to reduction for debts, while the assessment of other taxable personal property is, is no contradiction of the restriction contained in the act.

For the reasons above assigned, I am of the opinion that the order appealed from should be reversed, with costs.

Order reversed. JOEL TIFFANY, State Reporter.

CHARLES KELSEY, APPELLANT, v. GAMALIEL KING AND OTHERS, RESPONDENTS.

[In this case though all the judges concurred in the result, there was no concurring majority as to the grounds upon which the judgment was rendered.]

W. Brittin for Appellant.

A. McCue for Respondents.

DAVIES, CH.J.—This action was commenced in the City Court of Brooklyn, for the purpose of restraining the Defendant from constructing a sewer in a certain street in that city called Butler street, and from interfering with, or molesting the Plaintiff in the use and enjoyment of the territory comprised in the south half of said street, and that certain proceedings taken to open said Butler street be declared null and void.

The Plaintiff claimed in his complaint that he was the owner of the fee of the south half of said street, and avers that prior to the proceedings therein mentioned, the same had been dedicated to the public as a public street by this Plaintiff, and because thereof he was awarded, by the Street Commissioners, for his damages on the pretended opening of said street as aforesaid, nominal damages only.

By an act passed April 16, 1859, a board of commissioners, called Sewer Commissioners, were organized in and for the city

Dedication—Of streets and alleys—Acceptance. 23 *N. Y. Supp.* 822.

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of Brooklyn, and, by the third section of said act, the said board was authorized to take proceedings "to acquire land and interest therein, for the construction and maintenance of sewers, where such sewer is proposed to be run through lands which are not part of a public street or place."

The complaint also avers that said Commissioners prepared a plan for sewerage in said city, which provided for a sewer in said Butler street; that said Plaintiff objected to said plan, among others, on the ground that the said street had not been opened, and that the location of said sewer in that street would involve the necessity of opening the same, by which was evidently meant that the land embraced therein had not been taken for public use and compensation made therefor.

That thereupon the said Commissioners presented a petition to the Supreme Court, for the appointment of commissioners to open said street.

The proceedings taken to open said street are also set forth in the complaint, and it was claimed that all said proceedings were illegal and void. The Judge who tried this action without a jury, found the following facts:

1. That Defendants King, Frank, Northrup, and Lewis, are the Sewer Commissioners of the city of Brooklyn, duly appointed under the acts of the Legislature, passed April 15, 1857, and April 16, 1859, and that the Defendants herein, Kenny and Halliday, at the time of the commencement of this action, were engaged in the construction of a main sewer in Butler street, between Columbia street and the East River, in said city, under a contract for that purpose entered into between them and said Commissioners on the part of, and in the name of the city of Brooklyn.

2. That said Commissioners, under the provisions of the aforesaid acts, established a plan of drainage and sewerage for that part of the city of Brooklyn embracing Butler street from Columbia street to the East River, and on the 21st day of December, 1859, filed a map of the district, containing the same, as required by said acts, on which said map the said sewer, as aforesaid, was designated as a main sewer.

3. That a main sewer through said street as aforesaid, was,

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in the judgment of said Sewer Commissioners, necessary and proper, and was by them in good faith so determined to be.

4. That neither at the time of filing said map as aforesaid, nor until the proceeding for opening said Butler street, as thereinafter specified, had said street been opened, but that said Butler street was laid out as a public street and highway, upon the Commissioners' map of the city of Brooklyn, duly filed.

5. That on the 15th day of December, 1859, said Commissioners presented their petition to the Supreme Court, for the appointment of Commissioners to open said Butler street. That a notice of said intended application was given under section 8 of said act of April 15, 1857, and that on the 16th of December, 1859, three persons were appointed said Commissioners, and that copies of said petition, notice of said intended application and order appointing said Commissioners, were annexed to said complaint.

6. That said Commissioners for the opening of said street proceeded to make up their report in said matter, and presented the same for confirmation to the Supreme Court in July, 1860. That said Plaintiff objected to the confirmation of said report, but that said report, then and there confirmed and annexed to the answer, was a true copy of said order of confirmation.

7. That, prior to the proceedings of said Commissioners to open said street as aforesaid, the same, as far as the interest of the Plaintiff's sewer is concerned, *had been dedicated to the use of the public as a public street* by said Plaintiff, and because thereof he was awarded, by said Commissioners on their said proceedings to open said street, nominal damages only.

8. That at the time of the commencement of this action, the Plaintiff was a resident and property holder and owner in the city of Brooklyn; that he owned at the time of the opening of said street as aforesaid, and had during several years preceding owned a majority in interest upon that portion of Butler street thereinbefore mentioned, being the south half of the said portion of the said street; that his property was within the district of assessment fixed upon by the Commissioners who made the opening of said street as aforesaid; that Plaintiff now owns

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the fee of the south half of said portion of said street as aforesaid, subject only to the rights of the public, acquired by the opening of said street as aforesaid.

And as conclusions of law, the judge found:

1. That said Butler street was, at the time of the construction of said sewer by the Defendants, a public street and highway of the city of Brooklyn, and had been regularly opened according to law.

2. That the Plaintiff had no cause of action against said Defendants, or either of them, and is not entitled to the relief prayed for in the complaint.

3. That the Defendants are entitled to judgment in their favor against said Plaintiff, dismissing the complaint with costs.

Judgment accordingly for the Defendants was affirmed at the General Term, and the Plaintiff now appeals to this Court.

If the Defendants had no legal right to use the street in question for the purpose of constructing a sewer therein, it is made a question whether the Plaintiff has resorted to the proper remedy to enforce the rights claimed by him. But it is not important to pass upon that question in the present case, in view of the conclusions arrived at.

The parties have sought to obtain a decision upon their respective legal rights, without specially insisting whether the proper remedy has been adopted for ascertaining them.

It will be convenient to ascertain, in the first place, what rights the public acquired in the lands of the Plaintiff from the dedication thereof. It is found as a fact in the case "that said street had been dedicated to the use of the public as a public street by the Plaintiff.

A street is another name for a road or highway in a village or city (2 Bouvier's Law D. 547; 4 Sergt. & Rawle, 106).

In the latter case, Ch. J. Gibson says: "In common parlance the word street is equivalent to highway." This street was therefore dedicated to the use of the public as a public highway. The Plaintiff, by this act, only granted to the public the right to use this land as a public highway, and retained to himself

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the fee of the land, and all other rights appertaining thereto, subject to such easement or servitude.

"It is not necessary, in order to effectuate a dedication, that the owner of the land dedicated should part with the fee of the same. Nor is it inconsistent with an effectual dedication, that the owner should continue to make any and all uses of the same which do not interfere with the uses for which it is dedicated" (Washburn on Easements, p. 137, and cases there cited).

"A highway," says Swift, J., in Peck v. Smith (1 Conn. Rep. 132), "is nothing but an easement, comprehending merely the right of all the individuals in the community to pass and repass, with the incidental right in the public to do all the acts necessary to keep it in repair. This easement does not comprehend any interest in the soil, nor give the public the legal possession of it."

The use of the highway, by any person for any purpose other than to pass and repass, is a trespass upon the person who owns the fee of the road (1 New Hamp. Rep. 16; Babcock *v.* Lamb. 1 Cowen, 238; Jackson *v.* Hathaway, 15 John. 447; Adam *v.* Rivers, 11 Barb. 390). In the latter case, Willard, J., says: "The public have no need of the highway, but to pass and repass. If it is used for any other purpose not justified by law, the owners of the adjoining land are remitted to the same rights they possessed before the highway was made. They can protect themselves against such annoyances, by treating the intruders as trespassers." But the rights of an owner of land dedicated to the public use were settled by this Court in the case of Williams *v.* N. Y. Central Railroad Co. (16 N. Y. 97). It was then held that "the dedication of land to the use of the public as a highway, does not preclude the owner of the fee, subject to the public easement, from maintaining an action against a railroad company, which, without his consent, or an appraisal of his damages, enters upon and occupies such highway, with the track of its road."

The opinion of the Court in this case received the concurrence of six Judges of this Court; and the rule, *stare decisis,*

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precludes us from questioning its binding character as an authority in point.

Selden, J., in his able and elaborate opinion in this case, says: "It is conceded that, by the dedication, the public acquired no more than the ordinary easement or right to use the premises as a highway, and that the Plaintiff continues the owner in fee, in respect to the unsold lots, to the centre of the street, subject only to this easement; but it is contended hat he aking and use of he street by the railroad company does not encroach upon the reserved rights of the Plaintiff, because the use of a street for the purpose of a railroad is only 'one of the modes of enjoying the public easement."

The learned Judge proceeds then successfully to combat this doctrine, and after a review of the cases says, in reference to this question: "Is this sound doctrine? Is it true that one who dedicates land for a highway or street dedicates it to the public use without restriction? I apprehend it is an assumption wholly unfounded, and contrary to a multitude of cases, in which it has been held that the public acquire nothing beyond the mere right of passing and repassing upon the highway, and that in all other respects the rights of the original owner remain unimpaired. I will not dwell longer upon this case, as it will not be seriously, and cannot be successfully, contended either that the dedication of land for a highway gives to the public an unlimited use, or that the Legislature have the power to encroach upon the reserved rights of the owner by materially enlarging or changing the nature of the public easement." It was urged in that case, as it is in this, that it is convenient to use the public highway for the purpose indicated, and that it is for the interest of the public that it should be so used. This argument is met and conclusively answered by Judge Selden, as follows: "It is the public interest supposed to be involved which begets the difficulty; and it is just for this reason that the constitution interferes for the protection of individual rights, and provides that private property shall not be taken for public use without compensation; a provision no less necessary than just, and one which it is the duty of the Courts to see honestly and fairly enforced."

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It is urged upon us with earnestness that the doctrine of this case has been impaired, if not overruled, by the subsequent case in this Court of The People *v.* Kerr (27 N. Y. 188).

An examination of that case will show that there is no ground for such an assumption. That in that case was controversy as to the legislative power and control over the streets of the city of New York, and whether it could lawfully authorize a railroad to be laid upon the surface of such streets, and to be used for the propelling of cars thereon, without compensation to the owners of lots abutting on and fronting on said streets. The finding in that case established for all purposes therein, that the city of New York is seized *in fee* of the land in all streets in front of the respective lots of the Plaintiffs in that action, *in trust,* to keep the same open and used as streets, in part by legal proceedings, and in part by dedication or cession.

The only question, therefore, decided in that case was, that as to streets thus held in trust by the Corporation of New York for the use of the public, it was competent for the Legislature or the sovereign authority of the State to declare and define the uses and purposes of the trust; and it was therefore held that the trust of the city being *publici jures,* it was under the unqualified control of the Legislature; and any appropriation of it to a public use by legislative authority was not a taking of private property so as to require compensation to the city, or to the owners of lots fronting on the street, to render it constitutional. Emott, J., in the opinion delivered by him, says: "In he case of an ordinary highway, all which the State or the public obtain by their dedication or opening is said to be an easement of a limited character.

All but this remains in the original owner or his assigns, with all its incidents, subject to no restrictions or adverse rights, except this right of passage by the public. Every right of use and ownership, and every right of action for an interference with either, which is not inconsistent with the free and common use of a highway, still belongs to the original owner of the soil. If the highway is closed, or the public rights relinquished, the land at once reverts in full and entire dominion."

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"Such is the rule which has been applied to all titles acquired by the legislative appropriation of property to public or *quasi* public uses."

The authorities are uniform that by dedication for purposes of a public highway, no rights are acquired by the public, except those of passage and repassage over the surface of the soil, and such as are incident thereto (Pearsall *v.* Post, 20 Wend. 111; ib. S. C., 22 Wend. 425; Jackson *v.* Hathaway, 15 Johns. 447; Cortelyou *v.* Van Brundt, 2 ib. 361; Stackpole *v.* Healy, 16 Mass., 33; Perley *v.* Chandler, 6 ib. 454; Trustees, &c., *v.* Auburn and Rochester R. R. Co., 3 Hill, 567).

In Pearsall *v.* Post (*supra,* 2 Cowen, J. 131), the Court says: "The relative rights, both of owner and passenger in a highway, are perfectly understood and familiarly dealt with by the law. Subject to the right of mere passage, the owner of the soil is still absolute master." And at page 133, quoting a case from 3 Watts, 219 "the franchise of the public was to pass over the soil, and no more;" and, "The amount of these cases is, that roads are made to be travelled on, and not to be occupied." And in the case in 3 Hill (*supra*), the Court says: "They (the public acquired no interest greater than a right of way, with the powers and privileges incident thereto. Subject to this easement, and this only, the rights and interests of the owner of the fee remain unimpaired." Chancellor Kent says: "They (the owners) may carry water-pipes under the highway, and have every use and remedy that is consistent with the servitude or easement of a way over it, and with police regulations" (3 Kent Com. 433). The learned author on easements already referred to (Washburn) at p. 196, lays down this doctrine: "So the owner of the soil of a way, whether public or private, may make any and all uses to which the land can be applied, and all profits which can be derived from it, consistently with the enjoyment of the easement. He may, as before stated, maintain ejectment to recover the land, and if the way is discontinued, he holds it again free from encumbrance. He may sink a drain or a watercourse below the surface, if he do it so as not to deprive the public of their easement." Citing the

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following cases: Perley *v.* Chandler (6 Mass. 454); Green *v.* Chelsea (24 Pick. 71); Pomeroy *v.* Mills (3 Vt. 279); Lade *v.* Shepard (2 Strange, 1,004); Adams *v.* Emerson (6 Pick. 57); Atkins *v.* Bordman (2 Mect. 457). These cases fully sustain the doctrine of the text.

In the latter case, Ch. J. Shaw observes:

"The owner of an estate or fee, by virtue of his interest and power as proprietor, may make any and all beneficial uses of it, at his own pleasure, and he may alter the mode of using it by erecting or removing buildings over it, or digging into or under it, without restraint. *Cujus est solum, ejus est usque ad coelum.* If any other person has an easement in it, the owner has still all the beneficial use which he can have consistently with the other's enjoyment of that easement. If the easement is a right of way, this consists in a right to use the surface of the soil for the purpose of passing and repassing, and the incidental right of properly fitting the surface for that use; but the owner of the soil has all the rights and benefits of ownership consistent with such easement. All which the person having the easement can lawfully claim, is the use of the surface for passing and repassing, with a right to enter upon and prepare it for that use, by leveling, gravelling, ploughing, or paving, according to the nature of the way granted or reserved; that is, for a footway, a horseway, or a way for all teams or carriages."

It would therefore seem to be most clearly settled by an unvarying current of authority, that in this act of dedication of this land to the public as a public street, the Plaintiff still continued the owner of the fee of the soil therein, and entitled to all the benefits and advantages resulting therefrom, subject to the easement granted to the public. We have seen what the nature of that easement is, and no case has been found in the books, which warrants the assumption, that by virtue of it, the soil of the street can be dug up or removed, or that the same can be occupied for any other purpose than a public highway. All the cases referred to negative any such position.

But it is urged that a dedication of a piece of land, in a village or city, to the use of the public, for a street or highway,

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grants a more extensive interest in the soil than a similar dedication not within those localities, and authorizes the use by the public of the land so dedicated for any purpose whatever.

This idea seems first to have been suggested by one of the Senators, in the case of Pearsall *v.* Post (*supra*), and was adopted and amplified by a learned Justice of the Supreme Court in the case of Plant *v.* Long Island Railroad Co. (10 Barb. 26).

In referring to this case, the reasons given for the use of streets in cities for all purposes which may be found convenient and useful, are that such streets have been taken and paid for. No allusion is made to the case of a dedication of land to be used as a public street or highway, and such a case is neither within the reason or the doctrine of Plant *v.* Long Island Railroad Company. Judge Edwards says: "As far as we are aware, it has not been customary, in this State, where the streets of cities have been appropriated to legitimate public uses for the promotion of health, trade, or commerce, to make compensation to the owners of adjoining lands. The reason of this undoubtedly is, that the streets are laid out for such purposes *as well as for highways;* and when the property of indiciduals is taken for streets, and the city makes compensation for the property so taken, it purchases and pays for the right to appropriate the land to all such legitimate uses as custom and the public good require that a street should be appropriated to." It is clear, therefore, that the remarks of the learned Justice, and which were quoted and approved of in the opinion in this case, had reference solely to streets in cities, the fee of which had been taken, by due process of law, and vested in the public authorities, and compensation made therefor. The street cases of New York are not, therefore, in point, and the principles adjudicated in them furnish but little aid in solving the question presented in this case. It was well said of these in the case of Bissell *v.* N. Y. Central Railroad Co. (23 N. Y. 61), that they "came before the Court in a summary way, upon application to confirm or set aside the assessments, and ought not to be regarded as so high evidence of the law as judgments of

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the Court pronounced after a full trial in an action according to the course of the common law."

Again, this latter case is an authority for another principle, not to be lost sight of, namely; that in continuing the effect of a dedication of land for a public street or highway, the same rules are to govern, whether it be for a highway in a village or city. It was said in the opinion in that case, that there was another very objectionable feature to those street cases, namely: that "they seem to have inculcated the idea that there was a different rule of construction to be applied in such cases to a deed of land in a city, from what there is to such a deed in the country. Such a doctrine," continued Judge Mason in the opinion, "I affirm, has no foundation in principle, and will not, I apprehend, find any favor with this Court."

The dedication, therefore, by the Plaintiff of the land comprised in Butler street to the use of the public as a public street, did not authorize the Defendant to enter upon that land for the construction of a sewer therein.

It remains to be considered what rights they acquired by the proceedings had and taken under the acts of April 15, 1857, and April 16, 1859. The constitution of this State declares that private property shall not be taken for public use without compensation, and that when private property shall be taken for any public use, the compensation to be made therefor, when such compensation is not made by the State, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law. In the present instance the law prescribed the manner of ascertaining the compensation to be made for acquiring the lands of Butler street and any interest therein, for the construction and maintenance of sewers. An application was made pursuant to statute to a court of record which which appointed these commissioners, who proceeded to ascertain and fix the compensation to be paid, and upon due hearing, this Plaintiff having his day in Court and being heard in opposition thereto, the Court confirmed the report of the commissioners, and thereupon the compensation to be paid this Plaintiff for his interest in Butler street, for the

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construction and maintenance of sewers, became fixed and ascertained. Such confirmation becomes final, and the City Comptroller of Brooklyn is authorized by law to pay, on such confirmation, to the persons to whom damages may have been awarded in such report, the amount of such damages (§ 16, Charter of Brooklyn; Laws of 1850, p. 270).

It is believed that it has been satisfactorily shown, that the Plaintiff, notwithstanding the dedication of the land of Butler street to the use of the public, for a public street, still had and retained an interest in the soil thereof, subject to such covenant, and that the land so dedicated could only be used for the purpose of a public street or highway.

It is manifest that the corporate authorities of Brooklyn were of the same opinion, for the proceeded, pursuant to statute, to ascertain the damages the Plaintiff would sustain, and the compensation to be made to him for the use of said land for the maintenance and construction of sewers therein.

That compensation has been ascertained in the manner provided by law, and this Court in this action cannot review that adjudication, or institute an inquiry into the principles upon which it was made. We are to assume it was a joint compensation, and if the commissioners erred in fixing the amount to be paid at too small a sum, it is now too late to correct the error.

The interest of the Plaintiff in the soil of Butler street has been taken in the manner prescribed in the constitution and by statute for the purpose of maintaining and constructing sewers therein, and he was not therefore entitled to an injunction to restrain the Defendant from proceeding to construct such sewer.

On this ground the judgment of the Supreme Court was correct, and should be affirmed with costs.

All the Judges concur in the result, but there is no concurring majority as to the grounds upon which the judgment is to be rendered.

JOEL TIFFANY,
State Reporter.

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CHARLES B. COLBURN *v.* ALANSON P. MORTON AND HORACE GAYLORD.

Trustee's Purchase of Trust Property in good faith.

It is well that a person standing in a fiduciary relation to another cannot, in such relation, be allowed to purchase the property in respect to which such relation was created, or exists.

Thus, an agent cannot purchase for himself the property of his principal, an assignee for the benefit of creditors the property of his assignor, etc. Nor can a trustee purchase the property of his *cestui que trust.*

On setting aside an assignment accepted by the trustees in good faith, their sales under it will be ratified, and they will be indemnified in respect to all bonâ fide transactions thereunder.

BOCKES, J.—This is an appeal from an order of the General Term of the Supreme Court, reversing the judgment of the Special Term, entered on the report of a referee, the Appellant stipulating that judgment absolute might be entered against him, if the order should be affirmed.

The action was brought by a judgment creditor against his debtor, and the assigns of the latter, to set aside an assignment for fraud, and to have the assigned property and its avails applied in ratification of the judgment. The action was referred to Isaac A. Verplanck, as referee "to hear, try, and determine all the issues and matters set forth in the pleadings."

The referee having heard the case, decided in favor of the Plaintiff on all the issues made by the pleadings. and directed an accounting by the assigns in regard to the assigned property.

The referee's report was in due form. It contained his find-

Trustees—Dealing with trust estate—Benefits. 56 *N. Y.* 678; 5 *Hun,* 20; 25 *Hun,* 52; 26 *Hun,* 101; 35 *Hun,* 100; 49 *Hun,* 226 (17 *St. Rep.* 26; 1 *N. Y. Supp.* 680); 51 *App. Div.* 86 (64 *N. Y. Supp.* 544); 80 *Hun,* 233 (61 *St. Rep.* 643; 29 *N. Y. Supp.* 1022); 31 *Misc.* 479 (65 *N. Y. Supp.* 657); 66 *Barb* 222; 9 *Abb. N. C.* 29 (9 *Daly,* 114); 1 *N. Y. Supp.* 684.

Executors—Accounting—Surcharge—Measure. 8 *App. Div.* 344 (75 *St. Rep.* 171; 40 *N. Y. Supp.* 793).

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ings of fact and conclusion of law; and judgment was entered thereon at a Special Term, which declared the rights of the parties as determined by the referee and stated in his report. The report and judgment directed that a receiver should be appointed with the usual rights and powers of receivers in such cases. Also directed the appointment of a referee to take and state the account of the assigns.

No exception was taken to the report of the referee; nor was any case made showing the evidence of proceedings on the trial before him; nor was an appeal taken from the judgment or order entered on his report.

At a subsequent Special Term, an order was entered by consent of parties, referring it to Perry G. Parker, as referee, to take the accounting authorized and directed by the prior decision.

About one year and a half after the entry of this order of reference, Mr. Parker made his report, whereby he found and decided that all the assigned property which came to the possession of the assignees had been disposed of by them, or had been used and appropriated by them, rendering them chargeable with its value, and he certified a balance against Morton and Gaylord, who alone had received the property and its avails of $1,575.90, which sum they were now directed to pay to the receiver. This report was confirmed at Special Term, and an order was entered thereon directing Morton and Gaylord to pay to the receiver the sum certified against them, with interest, within thirty days of that execution issue against them therefor. From this order or judgment the Defendants Morton and Gaylord appealed to the General Term, and the General Term on considering the appeal, reversed both orders, as well the one entered on the report of the second referee as also that entered on the report of the first. The case made on the appeal contained only the evidence and proceedings before the second referee, Mr. Parker, and as appears from the order of the General Term the reversal was for errors of law and errors of fact.

(The practice adopted in this case was here discussed at con-

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siderable length, and disapproved. But it was considered that the case, as presented, admitted of a review by this Court of the principal question touching the merits argued on the appeal and the opinion produced as follows:)

If we unite the two orders—that made on the report of the accounting referee with that made on the report of Mr. Verplanck—we have, in effect, a judgment and decree complete in all its parts; and the appeal will stand according to the plain intent of the party appealing, as an appeal from a part only of the judgment; an appeal from that part affected by the accounting, as to which only exceptions were taken and a case was made for review.

This is the form in which the case was presented on the appeal to the General Term. The order entered on the report of Mr. Verplanck, was the judgment to the extent that it determined the issues made by the pleadings, and was rendered complete by the supplemental order entered on the report of Mr. Parker, both of which should have been combined had the correct practice been adopted.

In this view of the case the General Term was in error in reversing that part of the judgment directed by the decision and report of Mr. Verplanck.

That part had not been appealed from—hence was not before the Court for review; nor had exceptions to it been taken; nor had a case been made and settled showing the proceedings before the referee. It is also certified to this Court that the reversal by the General Term was for errors of law and errors of fact. But it could not be seen that Mr. Verplanck reported erroneously on the facts, for no case was made showing what facts were established before him.

The Court could not, therefore, say that his findings of fact were erroneous. Was Mr. Verplanck in error in his conclusions of law?

If right in my view of the case above expressed, the parties must be held to have acquiesced in his conclusions of law by omitting to enter exceptions or to appeal.

But let it be conceded that the General Term had the right

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to review the decision entered on the report of Mr. Verplanck, and its reversal was manifestly erroneous. The point of error suggested by the General Term as regards Mr. Verplanck's report was, that he held the assigns to account as trustees; notwithstanding the assignment was adjudged fraudulent and void.

It is made to appear from the pleadings, and from the evidence produced before Mr. Parker, that there were liens on portions of the assigned property by virtue of levies under execution and by chattel mortgage, at the time the assignment was made.

After the assignment and on sales under such executions and mortgages, the assigns became purchasers, at sums less than the actual value of the property purchased by them. The referee held and decided, that, in regard to such property, the assigns must account for the difference between the price paid by them on such purchases, and its actual value. This difference was subsequently, on the accounting before Mr. Parker, found to amount in the aggregate to $535.80.

The ground of such decisions was that the assignees claimed to hold this property as there own, relieved from the trust. They so claimed from the first, before the assignment was adjudged void, and while they were insisting on its validity. They put their claim in the record by their answer. They there admit that they claim to hold certain personal property, which formerly belonged to Frye, in their own right, and allege in justification of such claim that, although the property came to their possession by intent of the assignment, yet at that time it was under levy on execution, and was subject to chattel mortgages, under which it was subsequently sold, and that on such sales they became purchasers.

The claim of absolute ownership was asserted and persisted in until after judgment was rendered against them; and the Supreme Court sustained the claim (erroneously I think), not on the ground put forward in the answer, but on ground equally untenable, that the assignment being decreed void, they were discharged from all the duties, obligations, and responsi-

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bilities which otherwise would have rested on them as trustees, in regard to their purchases of trust property on sales under liens which attached prior to the commencement of the trust. A trustee will not be permitted to make profit for himself out of the trust property; and it is his duty to protect it to the best of his ability from sacrifice on sales which would overreach and destroy his title, and purchases by a trustee in those cases accrue to the benefit of the trust fund.

It was held in Jewett *v.* Miller (10 N. Y. 402), that "one standing as trustee in respect to property in his possession is not permitted to purchase and hold it for his own benefit, although the sale is a judicial one under a title superior to that of the trustee or the *cestui que trust.*" It was said by the chancellor in Van Epps *v.* Van Epps (9 Paige, 237), that it was a rule of universal application, "that no party can be permitted to purchase an interest in property, and hold it for his own benefit, where he has a duty to perform in relation to such property which is inconsistent with the character of a purchaser on his own account and for his individual use." In Slade *v.* Van Vechten (11 Paige, 21), it was decided that a trustee who buys in the trust property under a prior incumbrance, and at a price below its real value, is always considered as doing so for the use ond benefit of his *cestui que trust.* (See also the following cases: 1 Sandf. Ch. 148; ibid. 214; ibid. 251; 3 Sandf. Ch. 60; 4 Sandf. Ch. 263; ibid. 37; 7 Hill, 260; 4 Cow. 717; 9 Paige, 649; 4 Kent, 438; Story's Eqt. Jur., Sec. 321, 322, 465; Willard's Eqt. Jur. 186, 187; 11 Barb. 356; 22 N. Y. 327.) The authorities bearing on this subject, both in England and in this country, are collected by Davies, J., in Gardner *v.* Ogden; (22 N. Y. 327), where the principle which excludes a trustee from all rights to purchase the trust property and hold it for his own benefit, is clearly and emphatically reiterated and affirmed. The trustee will, of course, be indemnified for his advances on a purchase held to be made for the benefit of the beneficiary, and will have a lien on the property purchased for the sum advanced (10 N. Y. 406; 11 Paige, 21).

These equitable principles are applied to trustees in regard

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to their dealings with the trust property in cases of valid trusts, and they should also have application on settlements and accountings with trustees or assigness in cases of fraudulent assignments, when adjudged void. Although the assignment is declared void, the assignees will be protected in so far as they have acted under it in pursuance of its provisions in good faith; (4 Paige, 23; 5 Paige, 13; 6 Barb. 470; 24 N. Y. 505.) They have the benefit of it in their accounting until the fund or property held by them under it is arrested by the creditors' suit, whereby its application is changed by operation of law. A fraudulent assignment is not absolutely void, but void only as to creditors on due application to the Court. Neither the assignor nor assignees can be heard to assert its invalidity, and so long as the assigned property and its avails remain in the hands of the assigns, they continue trustees in regard to it.

If not trustees to carry the provisions of the assignment into effect, they are trustees for the creditors, who by their proceedings have acquired the right to control the application of the property. As was well said in the dissenting opinion in this case, when under consideration in the Supreme Court, "If they hold under the assignment, they are trustees of an express trust to be executed according to the directions of the instrument; but if the assignment be avoided by creditors, the assignees are trustees for the creditors under an equitable or constructive trust to be executed as the law adjudges through the Courts.

"It is impossible for them to escape that relation, and it is by reason of its existence after avoiding the instrument by which they take title from the assignor, that the Court either divests them of the property, or orders them to account for what they have received under it."

The authorities above cited show conclusively that the assigned property purchased in by the assignees still belonged to the trust fund, subject only to the assignees' right of indemnity for their advance on the purchase.

When or by what process did the assignees obtain a better title?

It is plain they had none, and it is equally apparent that the

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creditors by their proceedings acquired a right to the entire fund as it existed in their hands. The action of the creditor in equity operated on the trust property in whatever form, and under whatever condition it was held by the trustees, wresting it from the illegal direction given it by the fraudulent instrument, and giving it application as the law required. The assignees should not be allowed to profit by the proceeding, otherwise a temptation would be opened up to them to violate their duty.

If they would be allowed gains in case the assignment should be adjudged void, which they could not have if it continued in force, there would be an inducement offered them to aid in the destruction of the trust. No principle is better settled than this, that trustees cannot be permitted to hold a position hostile to the trust.

They can no more be allowed to make profit by its destruction than by its execution, and consequently cannot hold property discharged from the trust in one case, which would be subjected to it in the other. Again: It has been shown that the assignees were protected by the assignment, while acting under it in good faith. As a consequence they should be subjected to the duties, obligations, and responsibilities which attached to their position. There is no hardship in the application of these rules to a case of accounting by assignees, like the one here under consideration, for under their application assignees are secured full and perfect indemnity. All that is required of them is that they shall surrender and deliver over to the receiver the entire trust property which came to their hands, or its avails, deducting all payments made by them in good faith in performance of the trust, and on being allowed for all labor, expenses, and advances made and incurred in its protection and preservation.

If allowed other and greater rights, they will be permitted to hold gains acquired in their use of the trust funds or resulting from their management of the trust property. The rule which should obtain is well stated by Mr. Justice Davies, in his dissenting opinion in this case, that "When the assignment is held

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invalid as against creditors, the rights and relations of the assignees (except so far as they have in good faith executed the trust) are precisely those that would arise if the property had been delivered to them by the assignor with the express directions to do what the law adjudges they are bound to do; and hence the rule relating to trustees, and preventing them from from acquiring any interest in the property hostile to the beneficiary, and especially their making any speculations upon it, is fully and at all times operative."

It follows from these considerations, that the assignees were properly charged in the accounting with the difference between the amount paid by them on the purchase of the property, and its actual value. They might have relieved themselves from this amount by turning over the property to the receiver, on being paid or allowed the sum advanced on its purchase; but they elected to hold it as their own discharged from the trust.

They so claimed it in the pleading, and still so claim it.

They were consequently properly charged with its value, less the amount paid by them on the purchase. In any view that can be taken of the case, the reversal of the order or judgment entered on the report of the first referee, Mr. Verplanck, was erroneous.

We are now brought to a consideration of the order or judgment of the Special Term entered on the report of the second referee, Mr. Parker.

An appeal was taken from this order to the General Term, where it was reversed.

It is first objected that the reversal was erroneous, because there was no sufficient exception either to the order, or to the report of the referee on which it was founded.

No exception to the order appears on the record, and only very general exceptions to the report of the referee.

But I think the substantial formalities were complied with sufficiently to authorize the General Term to examine the case on the merits of the accounting before Mr. Parker.

On such examination it was decided by the General Term, that several items, amounting in the aggregate to $535.80,

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were improperly charged against the defendants; and also that items amounting to $448.10, were improperly disallowed to them in the accounting, and for these reasons the General Term reversed the decision of the Special Term, unless the Plaintiff would stipulate to make what was deemed the proper deduction.

It has already been seen in the previous discussion of the case, that the General Term was in error in determining that the items making up the sum of $535.80 were improperly charged against the Defendants. This amount was the aggregate difference between the sums paid by the assignees upon sales of the assigned property, made under executions and chattel mortgages which held priority over the assignment, and its actual value.

The assignees insisted on holding the property as their own, hence were properly chargeable with such difference.

This subject has been above considered, and needs no further comment. Besides, the question had been determined by the prior decision in the case, which adjudication was concluded on the accounting referee, whether right or wrong. The adjudication stood as the law of the case until reversed, and the parties have made it conclusive on them by omitting to appeal. The accounting referee was therefore right in charging the assignees with these items, controlled as he was by the prior decision; and this should be all the more satisfactory, because in accordance with well-settled equitable principles.

The assignees claimed to be allowed for taking charge of and preserving the trust property, as for harvesting and saving the grain crops. Also $154.10, paid Mr. Allen on a mortgage which was a lien on a portion of the property.

These items amounted to $448.10 at the date of the referee's report.

The referee refused to allow these items. In this he was in error.

As the case was made before him, they were proper items to be allowed the assignees. They were items of expenditure proper to be allowed, were duly charged and verified in the account, and were not impeached. For aught that appeared

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before the referee, these items of expenses and payments were incurred and made, necssarily and in good faith, with a view to the preservation and protection of the property, to prevent its loss and sacrifice.

The assignees were entitled to full indemnity against such liabilitties and expenditures, and should be protected in the accounting, in so far as they acted intentionally for the benefit of the trust in good faith and without negligence. In the absence of anything impugning their fairness, the referee should have allowed those items to the assignees in their accounts.

For this error the case must go back to the accounting referee, unless the Plaintiff will consent to reduce the amount reported against the assignees to $1,127.80, as of the date of the report.

There were a great number of exceptions taken to the rulings of the referee on the hearing, principally in regard to the reception or rejection of evidence, but none of them are of sufficient importance to require comment here.

The order of the General Term appealed from should be reversed, without costs of appeal either to the General Term or to this Court, and the order of the June Term, 1859, should be reversed, and the case sent back on the matter of the accounting, to the accounting referee, Mr. Parker, unless the Plaintiff within twenty days after the filing remitted from the Court, stipulates to reduce the amount reported against the assignees, Morton and Gaylord, to the sum of $1,127.80, as of the date of the report; and in case such stipulation be given, then the order of said Special Term should be affirmed for the above-mentioned sum, with interest thereon from the date of the report.

All the judges concurred in the above opinion except Grover, J., who dissented.

Hunt, J., thought the appeal should be dismissed, but concurred with Bockes, J., as to the rules of law laid down in the opinion.

W. Woodbury for Appellant.

W. W. Mann for Respondents.

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DAVIES, CH.J.—The Respondents, together with William W. Mann, were the assignees of one Jesse Frye. The Plaintiff, a judgment creditor of Frye, having obtained judgment against him, and an execution issued thereon against his having been duly returned no property, instituted this action to set aside said assignment as fraudulent and void as against creditors, and to reach the property of Frye, and have the same applied in payment and satisfaction of his judgment. Such proceedings were had in the Supreme Court, that said assignment was declared fraudulent and void, and the assignees were directed to account and pay over to a receiver to be appointed, all the property, estate, funds, and effects of the said judgment debtor received by them; and the said Court did further order that said assignees deliver over to such receiver all the property then remaining in their hands, received and held by them under said assignment, and the proceeds and avails of so much of the property so received by them as had been by them sold to others, with interest on the same from the time of such sale or sales, and the value of all said property as had been used or converted to the use of them or either of them; except that they were not to account for so much of said property so received by them, as had been taken and sold on execution and chattel mortgages against said Jesse Frye, and not purchased by them or either of them on such sale or sales.

And it was further ordered and adjudged, that in regard to such of the property so sold on execution and chattel mortgage, that said assignees must account for and pay over to the said receiver the amount of the difference between the price paid on such purchase, and the then actual value of the property so purchased, with interest from the time of such purchase; and that the said assignees must account for and pay over to the said receiver the value of all property so assigned to them, which had been lost or wasted by their want of care. And a referee was appointed to take and state said account upon the principles mentioned in said order. The referee charged the assignees with the sum of $535.80, being the difference between the actual value of the property of their assignor, purchased by them, and the price paid by them for the same.

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And the referee also refused to allow the assignees certain payments made by them, amounting to the sum of $448.10. These disbursements were made for expenses of harvesting the crops, and securing the property assigned, and for money paid Orlando Allen upon a mortgage held by him upon a portion of the assigned property. There is no evidence that these payments were not made in good faith.

Judgment was entered up in conformity with the report of the referee, and on appeal to the General Term, that Court held that the Defendants should be credited with said sum of $448.10, and that the Defendants had been improperly charged with the sum of $535.80, the difference between the actual value of property of the assignor purchased by them, and the price paid therefor, and ordered a new trial, unless the Plaintiff would elect to reduce his judgment to the sum of $592. This the Plaintiff refused to do, and appealed to this Court from said order, stipulating that if the same be affirmed, that judgment absolute be rendered against him.

The only question which the appeal brings up for adjudication is the correctness of the order of the Supreme Court reversing the judgment of the referee, compelling the assignees to account for and be charged with the difference between the price paid on the purchase of the property of their assignor by them, and the actual value of such property at the time of such purchase by them.

It is to be observed that the Plaintiff, by virtue of his judgment and execution, and the lien acquired by the commencement of this action and the setting aside of the assignment of his judgment debtor to these Defendants, has succeeded to all the rights of their assignor of, in, or to all the property, funds, and effects of Frye, the judgment debtor. The law is well settled in this State, that one standing in a confidential relation toward the owner of property, is prohibited from purchasing or dealing with the property of such person. Gardner *v.* Ogden (22 N. Y. Rep. 327), and cases there cited; and McMahon *v.* Allen, decided in December, 1866. In Fox *v.* Mackreth (2 Bro. C. R. 400) it was held by the Master of the Rolls (after-

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wards Lord Kenyon), and by Lord Chancellor Thurlow, that a trustee for the sale of estates for the payment of debts, who purchased them himself by taking undue advantage of the confidence reposed in him by the Plaintiff, and who resold the same premises at a greatly advanced price, should be regarded as a trustee as to the sums produced by such second sale for the original owner. Nor is it necessary to constitute such liability, that the trustee should be the actor in making the sale. It is the fact of becoming the purchaser, and thus the owner of the property in reference to which he holds the confidential relation, which the law condemns. In the case of the York Buildings Association *v.* Mackenzie (8 Bro. P. C. 42), this rule of inhibition was applied with great firmness. The Plaintiffs were an insolvent company, and their estate was sold by the order of the Court of Sessions in Scotland at a public judicial sale, to satisfy creditors. The practice at such sales is, to set up the property at a value fixed upon by the Court, which is called the upset price, and which is affixed on information obtained and communicated to the Court by the common agent of the Court, who has the management of all the outdoor business of the cause. The Defendant, Mackenzie, was the common agent, and he purchased for himself at the upset price, he being the only bidder, no person appearing to bid more, and the sale was confirmed by the Court; and in the course of eleven years' possession he had expended large sums for buildings and improvements. There was no question as to the fairness and integrity of the purchase. It was held that Mackenzie was disabled from becoming a purchaser, and he was held to account for the value of the land purchased, after being credited with the amount expended by him for improvements. The English cases are very elaborately reviewed in the case of Aberdeen Railway Company *v.* Blaikie Brothers (1 Macq. 461), decided in the House of Lords, July 20, 1854. Lord Cranworth, in his opinion, says: "Agents have duties to discharge of a fiduciary character toward their principal; and it is a rule of universal application, that no one having such duties to discharge shall be allowed to enter into engagements in which he has, or

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can have, a personal interest conflicting, or which possibly may conflict, with the interest of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is, or may be, impossible to demonstrate how far, in any particular case, the terms of such contract have been the best for the interest of the *cestui que trust* which it was possible to obtain. It may sometimes happen that the terms on which a trustee has dealt, or attempted to deal, with the estate or interest of those for whom he is a trustee, have been as good as could have been obtained from any other person; they may even at the time have been better. But still, so inflexible is the rule that no inquiry on that subject can be permitted. The English authorities on this head are numerous and uniform." The same doctrine received the unequivocal sanction of the Court of Errors of this State, in Munro *v.* Allaire (2 Caines' Cases in Error, 183). Benson, J., in delivering the opinion of the Court, says: "It is a principle, that a trustee can never be a purchaser; and I assume it as not requiring proof, that the principle must be admitted, not only as established by adjudication, but also as founded in indispensable necessity, to prevent that great inlet of fraud, and those dangerous consequences which would ensue, if trustees might themselves become purchasers, or if they were not, in every respect, kept within compass. Although it may, however, seem hard that the trustee should be the only person of all mankind who may not purchase, yet, for the very obvious consequences, it is proper the rule should be strictly pursued, and not in the least relaxed." Chancellor Kent, in Davoue *v.* Fanning (2 John. Ch. R. 252), says, that he cannot but notice the precision and accuracy with which the rule and the reason of it are here stated by Judge Benson. Where a purchase has been made in violation of these principles, the *cestui que trust,* or those who may have succeeded to his rights, can either apply to have the sale set aside, or may affirm the sale and charge the purchaser with the actual value of the lands purchased, as done in the notable case of the York Building Association *v.* Mackenzie.

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So, in the present case, the purchase by these trustees might have been set aside, or it was competent to affirm the same, and charge the trustees with the value of the property purchased by them. In taking and adjusting the account of the trustees, it was therefore correct in the Special Term of the Supreme Court to direct that they must account for and pay over to the receiver in this action, the amounts of the difference between the price paid on the purchases made by them of the assigned estate, and the then actual value of the property so purchased, with interest from the time of such purchase. That difference—upon all the authorities—Frye, the assignor, would have been entitled to recover against his trustees, and the receiver in this action was also entitled to the same, for distribution among Frye's creditors. We think the General Term erred in requiring the plaintiff to deduct that sum from the amount of the judgment in this action.

We have no doubt that the Supreme Court properly allowed a credit to the trustees of the sum of $448.10, for payments made by them in good faith. It is well settled, that on setting aside an assignment accepted by the trustees in good faith, their sales made under it will be ratified, and they will be indemnified in respect of their acts done and payments made in good faith, in pursuance of its provisions. (Barney *v.* Griffin, 4 Sand. Ch. Rep. 552; Young *v.* Brush, 28 N. Y. 667, and cases there cited.)

The order granting a new trial should therefore be reversed, and the judgment of the Court at Special Term should be affirmed, upon the Plaintiff's consenting to deduct therefrom the sum of $448.10, as of the date of the said judgment.

No costs to either party upon this appeal.

Conditional reversal concurred in by BOCKES, DAVIES, SCRUGHAM, PARKER, and PORTER, J.J.

Reversed conditionally.

JOEL TIFFANY,
State Reporter.

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RICHARD M. HOE AND OTHERS, RESPONDENTS, v. JESSE SANBORN, APPELLANT.

Appeal—Taxation of Costs—Mandamus—Correction of Case.

An order of the General Term affirming an order of the Special Term denying a motion to re-tax costs and to correct the judgment roll, is not the subject of appeal to this Court.

Nor is an order of the General Term dismissing an appeal from an order of the Special Term refusing a mandamus, appealable.

Nor is an order dismissing an appeal from an order of Special Term denying motion to correct case, appealable to this Court.

PARKER, J.—The Appellant in his notice of appeal states that he appeals from the judgment in the action, and from three several orders of the Supreme Court, which he specifies. The Respondent, at the last September Term of the Court, moved to dismiss the appeals from the orders, when the Court directed the motion and the appeal to be heard together.

The orders thus appealed from are:

First. An order affirming an order of the Special Term, denying a motion for a retaxation of costs, and to correct the judgment roll.

Second. An order dismissing an appeal from an order of Special Term, refusing a mandamus.

Third. An order dismissing an appeal from an order of Special Term, denying a motion to correct the case.

These orders, clearly, do not come within the class of orders described by subdivision 2 of section 11 of the Code, for neither of them, in effect, determines the action and prevents a judgment from which an appeal might be taken. Nor does subdivision 3, of that section, include them. That subdivision authorizes an appeal from a final order affecting a substantial right made in a special proceeding, or upon a summary applica-

Appealable orders. 41 *N. Y.* 363; 28 *Hun,* 307; 8 *Abb. N. S.* 21.

Damages—Breach of warranty. 92 *App. Div.* 38 (86 *N. Y. Supp.* 783); 5 *Lans.* 328.

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tion in an action after judgment. None of these orders was a *final* order in the action. They were all made pending the appeal to the General Term, from the judgment entered upon the verdict. One of them is denominated, in the notice of appeal, an order dismissing an appeal from an order *refusing a mandamus,* and is claimed to be an order in a mandamus case. That is manifestly a mistake, as all the papers relating to that motion, which are entitled at all, are entitled in this action. This is true of the order to show cause, of the order denying the motion, of the notice of appeal from that order, and of the order of the General Term dismissing the appeal, which is the order here appealed from; and it is described in the notice of appeal to this Court, which is entitled in this action as the order made in this action at a General Term thereof, dismissing the appeal from the order of the Special Term refusing a mandamus.

This is the only occasion in which a mandamus is alluded to in the whole course of the proceedings in reference to that motion. The order to show cause makes no allusion to it, and there is nothing in the proceedings indicating that they have, in fact, any reference to a mandamus. It is impossible now to treat them, or the order in which they have resulted, otherwise than as a proceeding in the action.

None of the orders appealed from being final orders, are the subjects of an appeal to this Court, and the appeals therefore should be dismissed.

The first subdivision of the section authorizes this Court, upon an appeal from a judgment, to "review any immediate order involving the merits, or necessarily affecting the judgment." So that we are brought to the question whether these orders are reversable under that provision.

The first of these orders is the order in relation to the retaxation of costs, and the correction of the judgment roll. The appeal from the judgment, I think, brings up this order for review. The question involved is, which party is entitled to costs; and this being a matter of strict legal right, may well be held to involve the merits, as such questions have been treated in the Supreme Court (St. John v. West, 4 How. 329; Tallman

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v. Hinman, 10 How. 89). I have no doubt that the motion at General Term was decided correctly, and the order therein made properly affirmed. The Plaintiffs were entitled to costs. The action is "for the recovery of money," and the Plaintiffs have in it recovered more than $50. It is true that the verdict of the jury was for but $10.84. But the action was upon a promissory note for $467.88. The Defendant admitted that the Plaintiffs were entitled to recover the whole amount of the note except $150 and interest; and as a condition of putting the cause over the Circuit, upon his motion, imposed by the Court, stipulated that the Plaintiffs might enter judgment for the amount so admitted, without costs, the cause to proceed as to the amount of $150, and all other matters in controversy in the action. Judgment was entered upon the stipulation, and subsequently the action was tried at the Circuit, upon the claim of the $150, and resulted in a verdict for $10.84. The Plaintiffs, in the judgment entered upon the verdict, recited the entry of the former judgment, and having had their costs of the action adjusted, inserted them also in the judgment. The Defendant insists that the judgment should be the ordinary judgment upon a verdict, omitting all reference to the former judgment, and that he is entitled to costs, and not the Plaintiffs.

The case is entirely within both the letter and the spirit of the statute, which gives costs to the Plaintiffs "in an action for the recovery of money, when the Plaintiff shall recover fifty dollars." This the Plaintiffs have done in this action. It is to be remembered that the Defendant had offered to the Plaintiffs judgment for the amount of the demand, less $150 and interest, which had been declined. At the time of the giving of the stipulation, the question of costs rested upon the reducing the recovery to the amount offered. If the Plaintiffs should recover any part of the $150, they would be entitled to full costs, and that question of costs constituted the "other matters in controversy" reserved in the stipulation from being affected by the judgment to be entered thereon.

In regard to the correction of the judgment. it follows that the order of the Special Term was right, so far as any question

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of substantial right is concerned, if the order as to costs was correct. As to any formal correction, whether it should have been made or not, was a question of practice, and not reviewable here.

The second order complained of, is the order dismissing the appeal from an order of Special Term, denying a motion that the judge who tried the cause resettle the case by reinserting therein the following words: "The Defendant requested the Court to charge the jury, that if they find from the evidence that the saw was not as warranted, the return of it absolved the Defendant from the payment of the price." The Court refused so to charge, and Defendant excepted. And the third order, of which a review is sought, is the one dismissing an appeal from an order of the Special Term, denying an application to the Court to correct the case by inserting the same matter.

Whether the General Term was right or not in holding that these orders were not appealable, becomes entirely immaterial, in the view which we take of the case upon the merits, as well in respect to the decision of the Special Term, sought to be reviewed by the appeal to the General Term, as to the judgment itself. The action was upon a promissory note for $467.88. The defence was, that the note was given for circular saws, which were warranted to be of a good quality; that they were not of a good quality, but entirely worthless. Upon the trial no question was made upon the breach of warranty, except in relation to one of the saws purchased, the price of which was $150. The uncontradicted evidence showed that the saw was sold by the Defendant to John Howard & Co., of Michigan, and sent to them; that they, upon trial, finding it bad, had sent it to the Plaintiffs in New York, as directed by Defendant in case it should be so found, and again received it from the Plaintiffs, after it had been retempered and reduced an inch in diameter; but not choosing to try it again, they sent it to Defendant at Sandy Hill, of whom it was purchased by Brown & Anderson, of Michigan, and sent to them, though not by Defendant's personal order. There is no other evidence in this case showing

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any return of the saw to the Plaintiffs. Upon this state of facts the refusal to charge as requested was, if it occurred, clearly right. The saw remained with Defendant, and he had sold it instead of returning it to the Plaintiffs as worthless; so that his request to charge "that, if the jury found that the saw was not as warranted, the return of it absolved the Defendant from the payment of the price," was based upon an assumption of facts wholly unwarranted by the evidence; his exception to the refusal could avail him nothing.

If, then, we should conclude that the orders were, in their nature, appealable, so that the General Term ought to have considered them on the merits, seeing, as we do, that the motions before the Special Term were properly denied, and that the effect of the dismissal of the appeals is precisely the same upon the judgment under review as an affirmance of the orders would have been, the error in the mode of arriving at the result, if there was one, is, as the case now stands before us, manifestly of no consequence.

We are brought, then, to a consideration of the exceptions taken upon the trial of the cause.

The jury were instructed, if from the evidence they should find a warranty of the saw, and a breach of that warranty, and that the saw was worthless as a saw, that the Plaintiffs were entitled to be allowed the value of the saw as old iron or steel. The Defendant excepted to this charge, and requested the Court to charge that, if the saw was worthless as a saw, the Defendant was entitled to a verdict. This the Court refused to charge, and the Defendant excepted. The jury found for the Plaintiffs only the value of the saw as old iron or steel; that is, they found a warranty, the breach, and that the saw was worthless as a saw—a verdict the most favorable possible to the Defendant, unless they had taken the view insisted upon by the Defendant, that, if the saw was worthless as a saw, the Defendant was entitled to a verdict.

The Court, I think, was right in the instruction given. There had been no disaffirmance of the contract by the Defendant, and when he was sued, as he was, for the price of the saw, which he

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had retained, he could only *recoupe* his damages for the breach of the warranty.

The warranty, whether considered as express or implied, was nothing more than a general warranty of quality; and the rule of damage for the breach of such a warranty is well settled to be the difference between the value of the goods, if they had corresponded with the warranty, and their actual value (Muller *v.* Eno, 4 Kern, 606; Voorhees *v.* Earl, 2 Hill, 288; Cary v. Gruman, 4 Hill, 625). Or as stated in Cary *v.* Gruman, upon the breach of the warranty of the quality of an article, the vendee is entitled to "such sum as, together with the cash value of the defective article, shall amount to what it would have been worth if the defect had not existed." That is what the jury were directed to give in this case.

I do not discover any foundation, either in justice or in law, for the distinction which the Defendant's counsel contends for, between the case when the article is wholly, and that when it is only partially unfit for the use for which it was intended, provided in each case it has some intrinsic value. In the one case equally with the other, if the article had been retained by the vendee he should, in estimating his damage, allow the vendor for the actual value of the article, and this is the doctrine of the cases.

There being no warranty that the saw was fit for any specific use, there is no opportunity for the application of the rule that the vendee is entitled to such damages beyond those contemplated by the rule above stated, as were the natural and necessary consequences of the breach, which has been applied to cases when the warranty has been so specific (Passenger *v.* Thorburn, 35 Barb. 17; S. C. 34 N. Y. R. 634). It is only to such cases that this rule has been applied. It was said in Hargous *v.* Ablon (5 Hill, 473): "A warranty or promise concerning a thing being general, that is to say, not having reference to any purpose for which it is to be used out of the ordinary course, the law does not go beyond the general market in search for an indemnity against its breach."

See also, Milburn *v.* Belloni (34 Barb. 607). The offer to

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show the damages which the Defendant had sustained, consequent upon the failure of the saw to operate, was therefore properly overruled.

There was no error in the admission of the testimony of the witness Lorick, as to the value of the saw as old iron or steel. He had been in the business of manufacturing saws thirteen years, and for an equal length of time before had been a blacksmith, and was familiar with material and quality of saws. These facts were, at least, prima facie sufficient to show him competent to speak of the value per pound of old iron or steel, and of the weight of such a saw. That the evidence itself is competent, appears from what has already been said in regard to the propriety of allowing the value shown by it to the Plaintiffs in the estimate of damages.

As the jury found a warranty and the breach already mentioned, it is unnecessary to examine the exceptions arising upon the admission or rejection of evidence with reference to the fact of the warranty. Whether those rulings were right or wrong, they have not prejudiced the Defendant.

Upon the whole case we are of the opinion that the judgment should be affirmed with costs.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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THE NORTH-WESTERN INSURANCE COMPANY, APPELLANTS, *v.* MARSHALL W. FORWARD ET AL. RESPONDENTS.

Insurance Suspended to secure Bottomry Loan.

When an Insurance Company, having a right to loan upon bottomry, and upon bond and mortgage, have already insured a vessel in the sum of three thousand dollars, and are unwilling to take a greater risk upon the same, are applied to for a loan upon bottomry by the owners of the vessel, it is competent for said Company upon an agreement between the parties to suspend an amount of the risk contained in the policy equal to the amount of the loan sought upon bottomry, during the bottomry loan, and to make the bottomry loan as desired.

This action was brought by the Plaintiff to recover the amount of two promissory notes against the Defendants as makers and endorsers.

The cause was tried at the Oswego Circuit before Mr. Justice Allen, without a jury, in May, 1860. Judgment was rendered in favor of the Plaintiff for the amount of the two notes, from which the Defendants appealed to the General Term, by which the judgment was reversed and a new trial ordered, from which the Plaintiff appealed to this Court.

The facts upon which the questions of law arise, sufficiently appear in the following opinion.

J. C. Churchill for Appellants.
D. H. Marsh for Respondents.

GROVER, J.—The right of recovery on the notes in suit was resisted by the Defendants upon two grounds: *First.* That the consideration of the original notes, of which those in suit were renewals, was illegal. *Second.* That the original notes were given for more than was due to the Plaintiff, assuming all the transactions to have been legal and valid.

The consideration of the original notes consisted of a balance claimed by the Plaintiff to be due to it of two loans, one of one thousand dollars and one of four hundred, made by the Plain-

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tiff to Bundy and others, owners of the schooner D. D. Bogart. It was claimed upon the argument that the Plaintiff by its charter had no power to loan money, except upon bottomry and upon bond and mortgage, and could not, therefore, maintain actions for the recovery of loans made in any other way. From the case and recitals in the bond, it would appear that the Plaintiff had given the Defendants, prior to the loans, a marine policy, covering certain perils, of three thousand dollars upon the schooner; that the Plaintiff loaned the owners of the schooner one thousand dollars, and took therefor their bond in the penal sum of two thousand dollars, conditioned for the payment of said one thousand dollars with lawful interest, containing clauses by which the vessel, &c., was hypothecated to the Plaintiff as security, and the Plaintiff assumed all risks covered by said policy, and providing that should the vessel be lost by any such perils as the company had insured by said policy, and the obligors should in that case, within thirty days pay such average as by law or custom might be payable for salvage, and should release to the company so much of the interest of the owners in said policy as should be equal to the principle and interest of the loan remaining unpaid, the obligation should be void. The four hundred dollars was secured by a like instrument, and the owners also, at the same time, gave the Plaintiff their negotiable note therefor.

The legality of the consideration depends upon the question whether these loans were upon bottomry, or upon bond and mortgage, as in the event of either loan not being so held, the consideration, at least in part, was illegal, and the new trial, therefore, properly granted. It was conceded, upon the argument, that the loans were upon bottomry, unless payment thereof was secured to the Plaintiff in case of the loss of the vessel by perils (the risks of which were assumed by the Plaintiff), the owners in the policy of the amount of principle and interest by the clause requiring in that event a release of the interest of the loan remaining unpaid, or in the four hundred dollar loan, or that payment in such contingency was secured by the note of the owners. It is clear, that in case payment in case of

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loss from such perils is not secured, it is a bottomry loan, for in that event the principal and interest of the loan is subject to loss from the hazards assumed by the lender, and it is equally clear, if such payment is secured, that it is not a loan upon bottomry, as it would be wanting in the essential quality of such loans—that repayment must be dependent upon the safety of the vessel upon which the loan was made. Hence the inquiry is, whether payment in case of loss of the schooner was secured to the Plaintiffff. The argument upon the part of the Defendants is, that the Plaintiff, having already insured the vessel for three thousand dollars, by means of which it would have been obliged, in case of loss, to pay that amount to the owners, the assignment in such event by the owners of an interest in the policy to an amount equal to what remained unpaid upon the loan, is an application of the right of the owners to money to the Plaintiff on account of the loan, and, therefore, equivalent to payment of the money by the former directly. This position would have been unanswerable, had the same argument been made by the owners in regard to the policy held by them issued by a party other than the Plaintiff. It is also, I think, the result of a strict literal construction of the contract. But its true meaning is to be ascertained by all the language used when considered in reference to the extrinsic facts known to the parties. It must then be considered that the Plaintiff, having already a risk of three thousand dollars upon the vessel, the amount of which, as appears from the papers, they were unwilling to increase, and having a right to loan upon bottomry, and upon bond and mortgage, and in no other way, were applied to by the owners for a bottomry loan upon the vessel. This loan, as also appears from the bond, the Plaintiff was willing to make, providing the amount at risk upon the vessel was not increased. This could only be effected by suspending an amount of the risk contained in the policy equal to the amount of the loan during its continuance. To this the owners could have no valid objection, as their amount of insurance would not be reduced. They had already paid the premium upon the risk of loss of the vessel, and hence no extra interest on account of

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hazard was charged upon the loan. In case there was no loss of the vessel, the policy would be of no consequence. A construction of the contract that would make the loan illegal, ought not to be adopted if fairly susceptible of one that will make it legal. It must be borne in mind that it was competent for the parties to deal with the policy as they saw fit—to cancel the same in whole or in part, to suspend its operations in whole or in part, for a longer or a shorter period, as might be found necessary for their convenience. I think the true construction of the clause in question is, that the operation of the policy should be suspended commensurate with the loan, and during its continuance, having it in force for the whole amount should the loan be paid before its expiration. This construction effectuates the intention of the parties. It makes the loan upon bottomry, and, therefore, legal, and perserves to the owners the entire amount of the risk assumed by the Plaintiff, for which it had been paid. The construction contended for by the Defendants makes the loan illegal, and in any event lost to the Plaintiff.

The four hundred dollar loan was secured by a similar bond, and also the negotiable note of the owners. It is clear that the loss of the vessel from a peril covered by the policy, would have satisfied the bond. It is equally clear that when two securities are given for the same debt by a debtor, satisfaction of one discharges both.

The note and bond are to be read together as one instrument, from which it would appear that the debt was discharged by the loss of the vessel, and the note in such event would, if otherwise valid, be discharged. But it is insisted by Defendant's counsel that, although this might be so had the note not been negotiable, yet being so, the Plaintiff might have transferred to a *bonâ fide* holder before maturity, and thus payment enforced in any event, and that, therefore, the note should be regarded as an absolute undertaking to pay. It is a sufficient answer to this that the note never was negotiated by the Plaintiff, and that if it had been, and payment compelled under a state of facts in which the Plaintiff had no right to its proceeds, the parties paying could have recovered the money so paid of the Plaintiff.

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It is insisted by Defendants's counsel that the entry of Plaintiff's Secretary shows that the note was the principal security, and the bond collateral thereto. The answer to this in this Court is, that that is a question of fact, and the judge, at Special Term, found against the Defendants, and such finding cannot be reviewed in this Court. The statute provides that when a judgment is reversed, and a new trial ordered by the General Term, such reversal shall be presumed to have been made upon the law, unless it shall appear from the order to have been made upon the facts. This also disposes of the ground urged by the Defendants, that the original notes were given for more than was due the Plaintiff. Upon this point the judge in substance found that there was no mistake, or error of fact, by either party; that a dispute arose as to the amount due, and the parties compromised such dispute by agreeing upon the amount for which the notes were given. Under these facts the parties are concluded by the sum agreed upon.

My conclusion is, that the order granting a new trial should be reversed, and the judgment rendered at Circuit affirmed.

All concur.

Reversed.

JOEL TIFFANY,
State Reporter.

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HENRY W. WARD, APPELLANT, v. ELISHA RUCKMAN, RESPONDENT.

Master's Interest—No Special Value.

The doctrine that the owning of a share in a vessel by the Master or Captain thereof, constitutes such share one of special value and authority as the "sailing master's interest or share," repudiated.

There is no such distinction as to the value of shares, whether owned by the Captain or citizen.

I. T. Williams for Appellant.
G. Dean for Respondent.

DAVIES, CH.J.—This action is brought to recover damages against the Defendant, for depriving the Plaintiff of the right claimed by him to sail and navigate, as captain, the schooner Ney. It appeared upon the trial, that in January, 1856, the Defendant and one William De Groot, were the owners of said schooner, the Defendant owning three-fourths parts thereof, and said De Groot owning the remaining fourth part thereof. That De Groot at the time was the captain of said schooner, and had sailed her as such. That the Defendant applied to the Plaintiff to take charge of the schooner as such captain, to which the Plaintiff replied that he would not sail the vessel without having an interest in her, for the reason that he should be liable to be turned out at any moment. The Defendant then informed him that he could purchase Captain De Groot's interest, and, on application to De Groot, he agreed to take $2,500 for his one-quarter. The Plaintiff testified that when he bought this quarter in January, 1856, the vessel was worth $10,000, exclusive of the master's interest. He also testified that there was nothing said between the Defendant and himself as to how long he was to sail the vessel on shares, nor when the contract was to terminate, but witness supposed as long as they both

Vessels—Joint owners—Rights. 143 *N. Y.* 452 (62 *St. Rep.* 458).

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kept her. The Plaintiff put in evidence the bill of sale from De Groot to himself, from which it appeared that De Groot sold to him "one-quarter of said schooner or vessel, together with one-quarter the masts, bowsprit, sails, boat, anchors, cables, and all other necessaries thereunto appertaining or belonging." The enrollment of the vessel set out in the bill of sale, recited the facts that the Defendant owned three-fourths of the schooner, and that De Groot owned one-fourth, and that they were the sole owners of said vessel, and that De Groot was then the master thereof. It appeared, upon the trial, that various witnesses testified that where a master owned an interest in a sailing vessel, it was known and called the sailing interest.

It was generally understood, that when a captain buys a master's interest in a vessel, it is worth more than without such interest—that a master's or sailing interest is sometimes worth fifty per cent. more than a citizen's interest, sometimes not worth more than from twenty-five to thirty per cent. The witnesses meant by this, that the privilege of being captain of the vessel, which privilege they supposed inhered or attached to any share of a vessel when owned by a captain, was worth a third more than a mere citizen's interest. Upon the Plaintiff resting his case, the Defendant moved to dismiss the complaint on the ground that the action would not lie, it not appearing that the vessel had been sold or destroyed by the Defendant.

The Plaintiff's counsel asked the Court to submit the case to the jury upon the question of damages, insisting—

1. That the Plaintiff owned a sailing or master's interest in the vessel, and that the Defendant had wrongfully deprived him thereof.

2. That the Plaintiff's interest in the vessel under the proof was an entirety, and that the Defendant had no joint or interest in common with him in his quarter of the vessel, that being the sailing or master's interest, the Defendant owning no such interest in the remaining three-quarters of the vessel.

3. That the Plaintiff had owned the privilege of sailing the vessel as captain and master thereof, and that having been deprived of the exercise of such privilege by the wrongful act of

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the Defendant, he was entitled to damages or indemnity therefor.

4. That in any view of the case, the Plaintiff was entitled to recover a sum equal to the difference between the value of a sailing or master's interest in one-fourth of said vessel, and the value of a citizen's interest in such one-fourth, if the jury should be of opinion upon the proof that any difference existed in the value of such respective interest. The Court overruled said questions, and nonsuited the Plaintiff, and gave judgment for the Defendant, which on appeal was affirmed at the General Term.

The foundation of the Plaintiff's right of recovery depends upon his establishing his first proposition, viz., that the Plaintiff owned a sailing or master's interest in the vessel.

There are several conclusive reasons which forbid our assenting to the soundness of this claim:

1. It is not apparent that De Groot had any such interest himself. He did not claim any such interest, and did not assume to sell and convey any such interest to this Plaintiff. His bill of sale, to which we must resort to ascertain what De Groot sold and what the Plaintiff purchased, makes no mention or reference to any such interest. It conveys only the one-quarter part of the schooner, her tackle and apparel, and the Plaintiff himself says he only paid the value of one-quarter part of the schooner, viz., $2,500, the whole being worth $10,000. Neither did he pay then anything for any such interest, and if De Groot possessed or owned any such interest he did not assume to sell any such interest, and no such interest was sold and conveyed to this Plaintiff. The Plaintiff claims such interest by virtue of his purchase from De Groot, but the muniments of his title show that no such interest was sold or assumed to be sold to him.

2. I have looked in vain at all the authorities referred to, and text-books accessible to me, and in none do I find any such interest mentioned or referred to; I find no allusion to any such interest, or that a master, who is a part owner of a vessel, has any such interest which he can sell and dispose of. If a master has such an interest attached to his share in the vessel, then, if

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it be capable of sale and disposition by him, and goes with his share as appurtenant thereto, it follows that he can by a sale of his share, however small soever it be, appoint a master of the vessel, in hostility to the wishes of all the owners, and greatly to their detriment. If the doctrine contended for be true, that a majority of the owners cannot change the captain or master at their pleasure, it would necessarily follow, that a perpetual captain or master might have the control of the vessel, in hostility to them.

But another serious difficulty will arise from the maintenance of this principle.

If the share of one captain or master was in having this sailing interest, how will it be if several captains or masters become the owners of shares in the same vessel?

Which having this interest is to take command to the exclusion of the others? If it inheres or attches to one, it must to all. And again, suppose that in the present case De Groot had subdivided this quarter into four parts, and sold a quarter part to four different captains or masters, which, or would all have had a sailing interest, or would each have had a quarter part of a sailing interest? In either event, which would have been entitled to the command of the vessel, and which to have maintained actions against the other owners for not having the command awarded to them? These considerations would appear to determine that no such intangible interest can exist in the ownership of a part or share of a vessel, and that the owners must necessarily own parts or shares of equal value, and with equal rights and privileges, and that it is utterly impracticable that a permanent right to command the ship should be attached to any particular share. This right certainly cannot spring from the circumstance, that, at some point of time, the ownership of a share in the vessel was united in the same power with the captain or master.

It would not be competent for the owners of the other shares to consent that a particular share should forever have the right to command the vessel; much less can that right arise when such owners do not consent. Card v. Hope (2 Barn.

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& Cres. 661), is a strong case in affirmance of this doctrine. Card & Cannan being the owners of nine-sixteenth parts of the ship Herefordshire, entered into a covenant with one Hope, whereby they agreed to sell him two-sixteenth parts of said ship, and that Hope should be appointed to the command of the ship, and that Card & Cannan should continue to be the managing owners.

It was further agreed that in case Hope, from ill health or other cause, should retire from the command, Card should be at liberty to appoint his successor upon such terms as should be approved of by Hope or his executors; and in case Card should decline to appoint such successor, then Hope or his executors should be permitted to appoint in his stead a fit and proper person to command the ship, and that the person so appointed should be entitled to all the privileges which Hope by said covenant was entitled to in right of such command. Lord Tenterden, in delivering the opinion of the Court, said: "It is impossible to read this deed without seeing that it is a bargain for a profit to be derived to the Plaintiffs from the appointment of the Defendant or his nominee to the command, the profit being either a greater price for the shares sold, or the continuance of the management and other powers and authorities in themselves, or partaking probably of both. And we are of opinion that such a contract is void, as being contrary to the interests of the charterers and of the other owners." He further observed: "It is a part of our national policy to give every encouragement to the equipment and employment of ships. Upon this consideration the law enables a majority of the part owners (under guards, indeed, to the interest of the minority, peculiar to itself) to employ their ship even against the will of the minority, that the ship may not remain unemployed. A power of employment vested in the majority seems to import a power of appointing officers, and in practice the majority certainly exercise that power. But such a power carries with it a duty—the duty of exercising a free and impartial judgment in the choice of every person who it to be entrusted with the management of the outfit, and with the navigation of the ship, *ut*

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dentur digniori; and any contract which is calculated to have the effect of fettering the judgment, and of binding the party to concur in the nomination of particular persons, at the peril of an action, is a violation of duty. The violation of duty becomes greater and more odious if the contract be founded on motives of peculiar gain and advantage to the contractors, all the part owners ought to share ratably in every profit that may be made of the ship. And if such contracts could be allowed by law, they must operate as a discouragement to persons to become part owners of ships. The duty, however, is owing not only to the charterers and other part owners of a ship, but also to all whose life or property may be embarked in her. And, consequently, a violation of the duty is contrary not only to the interest of the charterers and part owners, but also to another most important object, namely, the protection and safety of the lives and property embarked on the sea." These observations of this eminent judge are very pertinent to the case now under consideration, for a right is claimed here which it was in that case held unlawful should exist and be exercised by contract.

It cannot be successfully contended, that this Plaintiff possesses the right to command this schooner more securely than he would have done if it had been conferred by express contract.

To illustrate, suppose all the owners of this schooner had entered into a covenant with De Groot, that he, as owner of his quarter share, should have the command of the schooner, and that the same right should be enjoyed by his assignee. This is certainly putting the Plaintiff's claim in the strongest and most favorable light for him. Yet we see such an arrangement must be condemned, for reasons and considerations which are unanswerable and imperative. I think the learned counsel is mistaken in the supposition that there is any interest known in the law as a sailing interest, arising from the fact that the ownership of a share in a vessel, and the command thereof, are united in the same person. My researches have not enabled me to find a case where any such interest has been recognized, and protected and enforced; much less can I find, that in any instance has such interest been the subject of sale and transfer, and the

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vendee held, by virtue of such purchase, entitled to the command of the vessel, in opposition to the wishes of a majority in interest of the owners. If this claim be sound, then it follows, logically, that any one purchasing a master's sailing interest (if such a thing has an existence), becomes thereby, *ipso facto,* master of the ship or vessel, and has a vested right to take the command of her; and this result would obtain, how shall soever be the share to which this right inhered or attached. Such a right necessarily deprives all the other owners of any voice or control in the management of their property, and subjects it to the casualty of falling into the hands of the most untrustworthy and irresponsible. A person might, by the purchase of an insignificant share or interest in a vessel, assume the command thereof, in hostility to the wishes of all the other owners. If the purchase of a share in a vessel possessing this right vests in the vendee the right to command the ship, as is contended in the case at bar, then, as the master cannot be divested of that right and deprived of the command by a majority of the owners—as is also contended for—and cannot be removed by a Court of Admiralty, except on payment to him of the value thereof, or the damages which he may sustain by deprivation of the command—it is easy to see that few, if any, will be tempted to embark their property in enterprises over which they can have no control, and which will be subject to such grave embarrassments.

The theory of the learned counsel for the Plaintiff takes its origin in an assumption not warranted by the text-writers and the authorities, viz., that as a master, who is part owner of a vessel, cannot be deprived of the command by a majority in interest of the owners, he has a sailing or master's interest, arising from such ownership, of value, and of which he cannot be divested without his consent. It is seen that if the majority of owners can change the command of the vessel at their pleasure, then such an interest is a myth.

A very careful examination of all the authorities within my reach, has satisfied me that the true rule is, that in all cases the majority in interest of the owners has the right to control the

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vessel in every particular. And if so, it conclusively follows that no such interest exists as a master's or sailing interest.

Story on Part., § 432, says: "The common law not only thus gives to the majority in interest of the part owners the right and authority to employ the ship upon any proper voyage or adventure, but also confers upon the majority the right and authority, *in all cases,* to appoint the master and officers and crew of the ships, and do displace them at their pleasure, even although the master should be a part owner." And such, he says, is also the rule of the French Law; citing Boulay Paty, Droit Comm., tom. 1, tit. 3, § 5, p. 340. He proceeds to say that "this authority must be exercised by a free and impartial judgment in the choice of the master and officers and crew, and especially in the choice of the master;" and adds, that "any contract therefore, made by some of the part owners only, which is calculated to have the effect of fettering their judgment, and of binding them to appoint, or to concur in the appointment of particular persons as masters and officers, is a violation of that duty."

He refers with decided approbation to the opinion of Lord Tenterden in Card *v.* Hope (*ubi supra*), and says: "Such a contract is, therefore, utterly void, as against public policy and the true interests of commerce and navigation." Again, in § 445, Judge Story says: "We have already had occasion to state that the majority in interest of the part owners have a right to appoint the master and officers of the ship. This right necessarily carries with it the right to displace and dispossess the master and other officers, when in authority or possession of the ship; and it will make no difference, in this respect, whether the master or other officer be a part owner or not." And he adds: "However, when a Court of Admiralty is called upon to enforce this right, although it allows the authority to displace and dispossess to be exercised at the sole pleasure of the majority, if the master or other officer is a mere stranger, yet, if he is a part owner, the Court commonly requires some reasonable ground to be stated therefor;" citing the case of The New Draper, 4 Rob. Adm. Rep., p. 235 or 287, &c.

A remark by Sir William Scott in this case to the effect

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quoted, is the foundation of the doctrine now maintained, that the master, when he is a part owner, cannot be dispossessed by a majority of the owners in interest. That case will be hereafter adverted to. Flanders on Shipping, § 164, says: "The owners may dismiss the master at their pleasure;" and adds, "Upon a general retainer for no particular voyage, the master may be dismissed at any time, without cause assigned, because the nature of his employment, upon that condition, is a mere agency, to be revoked at any time by the principal."

Mr. Curtis, in his valuable work on the rights and duties of merchant seamen, at page 164, cites this passage from the Code de Commerce: "That if the master dismissed is a part owner of the ship, he may renounce his interest and require the reimbursement of the capital which represents it." And Mr. Curtis adds: "From these evidences of the maritime law, it would seem that the owners have a right to remove the master, who is a part owner, at their own pleasure, paying him for his share of the vessel." And at page 165, Mr. Curtis says: "If he (the master) is removed without good cause, after an engagement for a particular voyage, I think they are bound to pay him damages for the loss of employment as master, and for any losses or liabilities he may have incurred by reason of his appointment." This qualification of the removal, after an engagement for a particular voyage, is significant, and shows that the breaking of that engagement is the foundation of the claim for damages, not the fact of removal. Boulay-Paty, in his work, Droit de Commerce, tom. i., p. 332, says: "But as the majority (by Art. 220 of the Commercial Code) is determined by a portion of interest in the ship exceeding the half of its value, if the master is part owner of more than a half, he cannot be dismissed, for, if he was not the master, he would have the sole right to name one.

"Indeed, the master may own in the ship either a part equal to, or a part which exceeds the half, or a portion less than a half.

"In the first case his position is irrevocable, because a majority cannot vote against him.

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"In the second, no person is able to dispossess him, as no one other than himself has a portion which exceeds one-half of his interest.

"In the third case, the will of the other part owners can not exclude him.

"Finally, as by the Art. 220, it is the will of the greatest number in interest which can decide, it is not necessary that there should be an unanimous vote to dismiss the captain; it is sufficient that it is the will of the majority."*

In the Scottish Admiralty it is also held that ship-owners may dismiss the master at any time, without cause assigned, and the majority may dismiss him in his character of master, even if he be a joint owner (Bell's Com., vol. i., 506, 508).

We will now proceed to the examination of the few cases where this question, as to the power of removal of the master who is a part owner, has arisen, and been adjudicated. In the case of The See-Reuter (1 Dod. 22), the Admiralty Court in England removed a master, and part owner, in compliance with the decree of the burgomasters and counsellors of the city of Rostock, in senate assembled, and in whom the admiralty jurisdiction of that city was vested, and which had directed the master to deliver up the ship. Sir W. Scott said: "In cases of ships belonging to British subjects, the Court has no hesitation in ordering possession to be delivered up on the application of

*Boulay-Paty says: "Mais comme la majorité d'après l'art. 220 les détermine par une portion d'intérêt dans le navire excédant la moitié de sa valeur, si le capitaine était copropriétaire pour plus de moitié, il ne pourrait être congédié, car s'il n'était pas le capitaine, il aurait droit seul de le nommer.

"En effet, le capitaine a, dans la propriété du navire, ou une partie égale, ou une portion qui excéde la moitié, ou une portion inférieure.

"Dans le premier cas, il devient de fait irrévocable parce qu'une majorité ne peut voter contre lui.

"Dans le seconde, personne ne peut le révoquer, puis qu'en lui seul existe une portion excédant la moitié d'intérêts.

"Dans le troisième, la volonté de son copropriétaire, suffit pour l'exclure.

"Enfin, comme par l'art. 220, c'est l'avis du plus nombre qui doit décider il n'est pas nécessaire qu'il fait concours unanime congédier le capitaine; il suffit que la majorité soit de cet avis."

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a majority of the owners, without entering very minutely into the causes of dissatisfaction existing between them and the master." It is to be observed that this was said in a case pending for the removal of a master, who was also part owner.

The case of Johan and Siegmund (1 Ed. Adm. Rep. 242) was a suit in Admiralty to change the possession of a foreign ship, on the application of fifteen-sixteenths of the shares of the ship, against the master and owner of the remaining one-sixteenth part. Sir W. Scott refused to interfere, on the ground that the Court had no jurisdiction in the case of a foreign ship. He observed: "If this were a British ship, there can be no doubt that, by the practice of this Court, it would, upon the application of a majority of the parties interested, proceed to dispossess the master, though a part owner, without minutely considering the merits or demerits of his conduct."

The case of The New Draper has already been referred to (*ubi supra*).

The suit was brought by the owners of nine-sixteenths of the vessel against Walker, a part owner of seven-sixteenths, and also master of the vessel, for his removal, and a change of the possession. Sir W. Scott, in giving judgment, said: "The dispossession of a master is in its nature not an uncommon proceeding. All that the Court requires in cases where the master is not an owner, is that the majority of the proprietors should declare their disinclination to continue him in possession. In the case of a master and part owner, something more is required before the Court will proceed to dispossess a person who is also a proprietor in the vessel, and whose possession, therefore, the common law is, upon general principles, inclined to maintain."

The Court said the case was the common one of the majority of owners proceeding against another, in which the common rule of this Court must be pursued, and possession decreed to the owners representing the nine-sixteenth parts.

This cannot, therefore, be rightfully cited as an authority, that the majority in interests have not the power to displace a master who is a part owner, nor for the position that a Court

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of Admiralty will not, on the application of such majority, remove a master who is a part owner, and put him out of possession, and place the possession with the other owners. On the contrary, it is believed that it is an authority for the affirmation of both these propositions.

Judge Hopkinson, in the case of Montgomery *v.* Wharton (2 Pet. Ad. Rep. 397), justly says: "And however hard it may seem that the master should be subject to the caprice of his owners, as to his continuing in the command or not, he must consider it as one of the unavoidable inconveniences of his station, and in case of injury apply to the laws of his country for redress; but much greater would the danger be to owners, and to commerce in general, if the appointment of a master should be irrevocable for the voyage. Whatever good opinion an owner may have of the master at the time of his appointment, he may find sufficient reason afterward to change his mind, and yet not be able to produce any legal proof of defection or inability; and it would be an unreasonable hardship to compel an owner to continue, what was originally a voluntary trust, in the hands of a person of whom he has found subsequent reasons to believe that he may prove unfaithful or unskilful."

The same case is reported in 1 Dallas, 49, where the facts are stated to be, that the libellant, "Capt. Montgomery, was master and commander of the ship called the General Greene, designed for a voyage to Martinico. While the ship lay in the river a severe frost happened, which occasioned a great delay, and the owners thought proper to alter their plan. Differences then arose, and they dismissed Capt. Montgomery, and took the ship from him." The Court say: "As to the dismission of the captain, we are of opinion that, upon a general retainer for no particular voyage, the captain may be dismissed at any time, without cause assigned."

We deduce from these writers and these authorities this doctrine: that in all cases the majority in interest in the ownership of a vessel has the absolute right to employ who they will as masters, officers, and crew of the ship, and at their pleasure to

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displace them and employ others, whether the person so displaced be part owner or not.

That in the single instance of a master employed for a particular voyage, if the master be displaced without cause, he is entitled to recover the damages which he may sustain by reason of such wrongful dismissal and breach of contract. That a Court of Admiralty, in a case like that presented in the record, would have decreed the dismissal of this Plaintiff as master, and delivered the possession of the schooner to this Defendant. It follows from these considerations, that the Plaintiff did not possess any interest, called or known as a sailing or master's interest, and cannot, therefore, recover damages for being deprived of what he did not possess, and consequently could not lose.

The complaint was properly dismissed, and the judgment thereon for Defendant should be affirmed with costs.

Concurring: BOCKES, PARKER, HUNT, GROVER, and PORTER, JJ.

Affirmed.

JOEL TIFFANY,
State Reporter.

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MICHAEL FAY, RESPONDENT, v. GEORGE O'NEIL, APPELLANT.

Appeal—Evidence—Refusal to Charge.

Where Defendant has procured Plaintiff's arrest on a charge of perjury, it is not error in an action thereon for false imprisonment and malicious prosecution, to allow Plaintiff, as a witness, to be questioned by his counsel concerning his innocence of the charge.

Any question intended to be raised in this court must be brought specifically to the notice of the court below.

APPEAL from the Supreme Court.

The action was for false imprisonment and malicious prosecution. On the trial, before Mr. Justice Sutherland, at the New York Circuit, it appeared that the Plaintiff was arrested and imprisoned on a warrant procured by the Defendant, charging him with the crime of perjury. The Defendant subsequently abandoned the prosecution, and the Plaintiff was discharged by the magistrate. The charge was not brought before the Grand Jury, and the Defendant admitted that he did not intend to proceed further in the matter. Evidence was given, on the part of the Plaintiff, which, if it was credited by the jury, justified them in finding that the charge was made from malicious motives and without probable cause. The testimony was conflicting.

The judge was requested, in a series of propositions, to charge the jury that the verdict should be for the Defendant:

1. If he had probable cause for believing the Plaintiff had sworn falsely.

2. If he had reasonable grounds for believing him guilty of perjury.

Trial—Request to Charge—Refusal. 45 *N. Y.* 219; 11 *Abb. N. S.* 305;

False imprisonment—Discontinuance—Effect. 26 *Hun,* 576; 17 *Misc.* 88 (39 *N. Y. Supp.* 832);

Objections—When must be raised. 7 *Daly,* 388.

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3. If he, in fact, believed the charge to be true when he made the complaint.

He was also requested to charge the following propositions, respectively: that if probable cause was shown, the want of malice was presumed; that no actual malice had been proved; and that the Defendant was not required to prove the truth of the charge.

The judge declined to charge in the specific terms of these several requests; but he instructed the jury in substance, that if the Defendant had reasonable grounds, when he made the charge, for believing that the Plaintiff was guilty, there could be no recovery, even though the complaint was made from malicious motives; that the question, whether the complaint was made without reasonable or probable cause, was one of fact to be determined by them from the evidence; and that if he had probable cause for believing the charge, the verdict should be in his favor. He charged that if they should find that the complaint was made without probable cause, they must then pass upon the question whether it was maliciously made; and that it was not necessary that the Defendant should show the truth of a charge.

No exceptions were taken to the instructions given by the judge; but the Defendant excepted to his refusal to charge in the terms of each of the several requests.

The jury found a verdict in favor of the Plaintiff for $500. The judgment entered thereon was affirmed at the General Term in the First Judicial District.

Bogardus & Brown for Appellant.
John H. Reynolds for Respondent.

PORTER, J.—On the question of probable cause, the charge of the judge was substantially in accordance with the propositions submitted by the Defendant. On the question of malice, he properly declined to withdraw the issue from the consideration of the jury. He instructed them that if there was probable cause for the complaint, even though it was made from

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malicious motives, their verdict should be for the Defendant. There was no error in refusing to charge in the precise terms of the requests as framed and submitted.

It is suggested by the Defendant's counsel, that, as the Plaintiff in the first instance entered into a recognizance to appear and answer any indictment that might be preferred against him in the Court of Sessions, his subsequent discharge did not terminate the prosecution. No such point was taken at any stage of the trial. There was no allusion to it in the requests submitted to the judge, and it was not suggested as a ground for dismissing the complaint. If the Defendant intended to raise any such question, it should have been specifically brought to the notice of the Court. It is apparent from the evidence that there was no foundation for such an objection. The recognizance was provisional, and fell when the prisoner was discharged. It was not returned to the Court of Sessions, no indictment was obtained against the Plaintiff, and the present action was not brought until after the term named in the recognizance, and the abandonment of the prosescution by the Defendant.

The judgment should be affirmed.

PARKER, J.—The objection, by Defendant, to the question put by Plaintiff's counsel to the Plaintiff as a witness, "Was what you swore to on that occasion true?" was properly overruled. The malicious arrest of the Plaintiff, by the procurement of the Defendant, for the crime of perjury, alleged to have been committed by the Plaintiff upon a trial in the Marine Court, is the ground of the action. The "occasion" referred to in the question was the trial in the Marine Court.

There can be no doubt that the question of the Plaintiff's guilt or innocence of the charge made against him, was involved in the case; for if the charge was true, there could be no want of probable cause. The fact, then, which the question called for, was clearly pertinent and material.

The objection is not to the general form of the question, but to its substance.

No error was committed in overruling the objection.

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The Defendant's motion for a nonsuit was properly denied. The evidence proved, or tended to prove, all that it was necessary to prove to maintain the action. It was sufficiently shown that the prosecution was *at an end.* The complaint was dismissed by the magistrate, "in consequence of the complainant not appearing to prosecute at the time to which the case was adjourned." This was a sufficient termination of the prosecution (Clark *v.* Cleveland, 6 Hill, 344; Secor *v.* Babcock, 2 John. 203; Purcell *v.* Macnamara, 9 East, 361; Burhans *v.* Sanford, 19 Wend. 417; Watkins *v.* Lee, 5 Mees. & W. 270).

The recognizance which appears in the case as part of the proceedings before the justice, or rather appended to such proceedings, by which the Plaintiff was bound to appear at the next Court of General Sessions, is entirely inconsistent with the entries in the minutes showing the adjournment, and that the Plaintiff was bailed to appear for examination, and was, at the adjourned day, discharged. It was never certified to the Court of General Sessions, and was manifestly never used in any way.

It cames into the case after the certificate of the Clerk of the Court, authenticating the proceedings in Court only, without any authentication, and was not made the ground of any application on the trial. It should be regarded as a paper having no significance.

The charge to the jury contained the substance of all the Defendant's requests to charge, so far as they were legally correct.

I am of the opinion that the judgment appealed from should be affirmed.

All affirm.

JOEL TIFFANY,
State Reporter.

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SAMUEL H. HARTSHORNE v. THE UNION MUTUAL INSURANCE COMPANY.

Insurers presumed to know Customs of place.

Marine insurers are bound to know the custom of the place where they effect their insurance, and the law presumes they do know such custom, and have made their contracts in reference thereto.

This was an action to recover $9,200 for the loss of one hundred and eighty-four bales of cotton, burned on the boat Alabama, on the Chattahoochee River, in the State of Alabama, in the month of Fefruary, 1854. The action was tried before Chief Justice Bosworth, of the Superior Court of the City of New York, where the Plaintiff recovered judgment for the amount of his claim. The Defendants appealed to the General Term of the Supreme Court in the First District, where the judgment below was affirmed. The Defendants now appeal to this Court. The facts are fully stated in the opinion of the Court.

Alex. S. Johnson for the Appellants.
Wm. Tracy for the Respondent.

HUNT, J.—The Defendants, an insurance company in the city of New York, desired to extend their business to the insurance of cottons shipped upon the Chattahoochee River, from the upper portions of the river to Appalachicola, in the State of Florida. To accomplish this purpose, in the month of October, 1852, they appointed the firm of J. Day & Co. their agents, the said firm then being engaged in the mercantile and insurance business at Appalachicola. The mode of transacting this insurance business at Appalachicola differed from the ordinary mode, for the reason that the arrival of any particular boat at the various places on the river could not be known in advance, and shipments were made by good boats as they offered themselves; and for the reason that the mails were slow and irregular, and cottons shipped to a house at Appalachicola usually

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reached that city by the same vessel which brought advices of their shipment. Hence had arisen a custom which in 1852, and for many years before that time, had become an established usage and course of business, by which the insurance business at this place was transacted substantially in this wise: Persons engaged in receiving consignments of cotton at that place obtained from the insurer a certificate of insurance, expressed to cover shipments of cotton from various points on the river, to the holder of such certificate at Appalachicola. The holder kept a book in which he entered, as received, all shipments of the description specified in the certificate, with the value and requisite particulars; and after the end of each month he exhibited such pass-book to the insurer, and had the premium fixed. The fact of shipment was rarely known to the consignee or to the insurer before the termination of the risk. This course of business was well known at Appalachicola, and to the various parties effecting insurance with the Defendants, and to J. Day & Co. To enable their agents to carry on the desired insurance business, the Defendants, in November, 1852, issued to them and in their name an open policy of marine insurance, numbered 784, for $250,000. A certificate for the renewal of this policy, and an additional policy for $250,000, numbered 993, were issued to said J. Day & Co. in November. 1853. At the time of delivering the policy No. 784 to J. Day & Co., the Defendants also delivered to them, to be used in their insurance agency, a large number of certificates, one of which was delivered by Day & Co. to the Plaintiff, and is in the following words:

"Union Mutual Insurance Company of New York.

'F. S. Lathrop, President; John S, Tappan, Vice-President; Ferdinand Stagg, Secretary.

"Certificate No. 1.

"*Appalachicola, Nov.* 15, 1852.

"Entered this date, on policy No. 784, issued by the Union Mutual Insurance Company of the City of New York, *sundry amounts, per endorsements made in book accompanying this*

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certificate by J. Day & Co., on account of sundry parties whose names appear on book, payable in case of loss to *S. H. Hartshorne, on cotton shipped per good steamboats from points on the Chattahoochee River to Appalachicola, and consigned to S. H. Hartshorne, valued at per endorsements made in book by J. Day & Co.,* on board the ——, —— master, at and from —— to ——. Time of sailing, ——. Bill of lading dated ——.

"The said *S. H. Hartshorne,* therefore, *is* insured by the said Union Mututal Insurance Company, lost or not lost, for the said sum of, *per endorsement,* —— dollars as above.

"Binding. J. DAY & Co.

"*Appalachicola,* 15 Nov. 1852.

"Please pay to *S. H. Hartshorne,* or order, such sums or amount as may in case of loss become due on the above insurance of —— dollars, in the same manner as if a separate policy had been issued in his favor.

"J. DAY & Co.

"F. S. Lathrop, Esq., President Union Mutual Insurance Company."

This certificate, so issued to the Plaintiff, was pasted into his pass-book; and at the time of issuing the certificate, Day & Co. made the following entry in the pass-book:

"To cover all cotton shipped by or for any of the following parties, valuation per bale annexed to each name.

Roberts & Locke,	from Eufaula,		valued	at	$50,	per bale.
L. F. Stour,	"	"	"	"	"	"
J. M. Morrison,	"	"	"	"	"	"
D. Morris,	"	Georgetown,	"	"	"	"
L. J. Leand,	"	Eufaula,	"	"	$45	"
Harrison & Goodwin,	"	"	at invoice valuation.			
J. M. Hamilton & Co.,	"	"	"	$50	per	bale."

On the 15th of November, 1853, J. Day & Co. wrote on the

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original certificate issued to Hartshorne, a renewal of the policy from November 15, 1853, to July 1, 1854, and signed the same. At the same time they gave a renewal of the certificate issued to them, to extend to the same period. Further entries were made from time to time, increasing and decreasing the valuation of the cotton.

At the time of appointing J. Day & Co. their agents, and as a part of the means by which they made such appointment, the Defendants wrote to them a long and explicit letter of instructions on the subject of the business to be undertaken, and the manner in which it should be transacted. In this letter, among other things, it was said that "these policies are granted in the form presented, for the purpose of enabling you to take risks for other parties under the same, and the certificates are to be used as evidence for the award, that the certificates described by them are covered by the policy in your hands, and are considered by us in fact as representing a policy issued by the company itself, subject to all the conditions of the same, and in case of loss payable in like manner."

On the 3d day of February, 1854, the boat Alabama, while descending the Chattahoochee River, and having on board cotton to the extent of one hundred and eighty-four bales, valued at $9,200, consigned to the Plaintiff on account of the persons named in his certificate, was destroyed by fire. Proofs of loss were properly made, and served upon the Defendants; and upon their refusal to pay, this action was brought, demanding the issuing of a formal policy, and payment of the amount due.

I have stated a portion only of the facts of the case, as they appear upon the voluminous papers before us. Enough, however, is given to present the two principal question upon which the Defendants rely.

The first objection urged by the Defendant, on this appeal, relates to the agency of J. Day & Co. It is urged that Day & Co. had no authority from the Defendants to conduct the business of insurance in the manner they did; that risks should only have been taken while they were pending; and that the system adopted by Day & Co. of receiving a statement from the in-

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sured of the risks assumed during the previous month, after the goods had arrived in safety, or after they had been lost, and then paying premiums or demanding compensation, was not within the contemplation of the parties, or the scope of the agent's authority.

This objection is one of fact rather than of law, and in that view is not properly before this Court. We sit to review decisions of law only, while the appeal upon questions of fact is limited to the Courts below. The question whether, upon the facts found by the Court, a contract of insurance did legally exist, is a question of law, which we may properly consider.

I will, however, examine both of the propositions presented.

It is found as a fact by the Court below, that Day & Co. were the agents of the Defendants for the transaction of an insurance business at Appalachicola. It is further found that the system of insurance adopted by them was, and for many years had been, the universally received mode of insurance at that place. Indeed, from the necessities of the case, it would have been scarcely possible to have carried on the business of insurance there in any other manner. It is said by the Defendants' counsel that this circumstance would not justify a departure from the agent's instruction; that if he could not insure in accordance with his instructions, he should have declined to insure at all. Nothing can be more true than the principle thus asserted; and as between the agent and his principal, it would be conclusive. Here, however, the owners or consignees of the cotton, who made their contract with the Defendants through their agent, call upon them to respond, in fulfilment of their part of the contract, and other considerations intervene.

That the business, as conducted, was known to and approved by the Defendants, is quite clear. In the first place, they were bound, as marine insurers, to know the customs of the place, and are assumed in law to know them, and to have made their contracts in reference to them (1 Phillips, p. 43, ed. of 1840).

In the next place, their agents knew the custom, and had practised upon it for years. In a controversy between the Defendants and Day & Co., they might question the effect of this

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knowledge; but in a suit with a third party, the knowledge of Day is the knowledge of the company, and binds them absolutely.

I am strongly inclined to the belief, also, that the Defendants, in fact, knew of this mode of insurance, and were content with it while it was profitable. Much of the correspondence before the loss occurred, contains expressions assuming the existence of this practice; but it is not so explicit in its language as to be beyond doubt. The letter of Day & Co. to the Defendants, of March 6, 1854, in explaining the loss, stated with particularlty the mode of insurance adopted. In their answer of March 21, the Defendants' President finds no fault with this practice, and makes no allusion to it. The refusal to pay is placed upon the ground that the prior insurances had absorbed the whole amount of the policy of $250,000, and that its vitality was exhausted. Again, in their letter of April 1, 1854, the detail is repeated by Day & Co. at greater length. In replying to this letter, the President of the Defendants still makes no complaint of that practice, but informs them that "our views remain unchanged, and that we must insist that no part of the shipments by steamers Eagle or Alabama are covered by this office." Surprise is expressed by the company at the amount of insurance upon the cargo of a single vessel, and disapprobation. No complaint, however, is made, and no surprise expressed that the returns were made and the premiums paid in the manner stated. I am of the opinion, from the evidence and the findings, that the practice was understood by the company; that it was not disapproved by them until the occurrence of losses made it for their interest to repudiate it. This they cannot be permitted to do. Having enjoyed the good things belonging to the adventure, they cannot escape from the evil things necessarily connected with it. For nearly a year and a half they received large monthly premiums, based upon this precise mode of insurance, which they have never offered to return to the Plaintiff or the other parties paying them, but still retain and enjoy. Now that a loss has occurred, they

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must respond in damages, according to the terms of the same contract.

The certificate issued to the Plaintiff, in November, 1852, was an open policy to cover the cotton shipped to him from the points and the persons named. It was by its terms continuous, and was renewed by the certificate issued in November, 1853. The losses by the Alabama on the 3d of February, 1854, came within its terms. Although not within the precise terms of the Defendants' instructions, I do not perceive that it was in express violation of any instruction; and I have endeavored to show that if such had been the case, the Defendants cannot now make the objection. I see no reason, therefore, for disturbing the judgment upon the first ground claimed by the Defendants.

The Defendants also claim that they are not liable to the Plaintiff, for the reason that before the inception of the present risk, the insurance opened by the policy to J. Day & Co. was fully taken up, and that there was no space or opportunity for further insurance under the same. The Defendants claim the same result upon the facts, whether the isurance is restricted to the original policy, No. 784, or the policy 993, be treated as an extension of it, or the additional issue of $250,000 be included. In other words, they claim that before the incurring of the present risk, more than $750,000 had been taken upon these policies and their extension. The Plaintiff claims that this amount of insurance should be reduced by the sum of $78,748, for which J. Day & Co. had issued certificates to themselves, under the policy No. 784. These certificates, he claims, are void, inasmuch as J. Day & Co. being the agents for the Defendants, and bound to give to them the benefit of their skill and sagacity in making bargains for insurance, could not, by becoming themselves the assured, place themselves in a position where their private interests were in hostility to their duty to the Defendants. To this effect, in general terms, are N. Y. Central Ins. Co. *v.* National Protection Ins. Co. (4 Kern. 85); Bentley *v.* Columbia Ins. Co. (17 N. Y. R. 421); and those insurances, to the amount of $78,748, were held to be void by the judge who tried the case.

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The Defendants do not claim that at the time of issuing the original certificate to the Plaintiff, the amount of policy 784 was exhausted; and it appears in the evidence that this was the first certificate issued by the Defendants' agents. Neither is it claimed that the whole amount of the policies and the renewals had been taken up when the renewal certificate was issued to the Plaintiff in November, 1853. But returns were subsequently made to the agents, from time to time, of insurances therafter applied to certificates then issued, which in the aggregate absorbed more than the entire amount of the policies and their renewals. The judge trying the cause decided that if there was an aggregate limit of $750,000 upon the power of J. Day & Co. to assume risks, which could affect the Plaintiff in this action when the certificate of renewal was issued to the Plaintiff, then all definite risks entered subsequently to the renewals of November, 1853, and all entries of risks arising under general certificates issued after that date, should be excluded from the computation of risks under such supposed limit, as between the Plaintiff and the Defendants in this action.

I concur in this statement of the law. The certificate issued to the Plaintiff was in effect an open, continuous policy; and, as it appears from their original letter of instructions, this was the precise effect that the Defendants intended to give it. They say that "these certificates are to be used as evidence that the risks described by them are covered by the policy in your hands, and are considered by us in fact as representing a policy issued by the company itself, subject to all the conditions of the same, and, in case of loss, payable in like manner." They say further, in the same document: "We have not named a limit on the marine policy, knowing the great difficulty you would have in fixing an amount with the parties for whom you would be called upon to insure, but it is our wish," &c. On the margin of the policy to J. Day & Co. was written as follows: "Messrs. J. Day & Co. are authorized to settle and compromise all losses, where, in their discretion, they may consider it their interest to do so, with out waiting for instruction from the company. . .. This policy to be deemed continuous, unless otherwise directed

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by either party; thirty days' notice being given to the assured, to enable the risks . . . &c., to terminate."

Under this ample authority and intelligent explanation of its effect, J. Day & Co., in November, 1852, issued to the Plaintiff a certificate that he was insured, according to the endorsements made and to be made by Day & Co. in a certain book accompanying the certificate, for cotton shipped to the Plaintiff on account of the persons whose names were mentioned in the book; and it was therein declared that the Plaintiff was insured according to the endorsements, lost or not lost. In November, 1853, this certificate was renewed to the Plaintiff until July 1, 1854, and upon the same terms.

We have here an open policy issued by the Defendants to the Plaintiff; that is, the value of the goods insured is not ascertained and declared in the policy, but the same is to be subsequently ascertained, as occasion shall require. We have also a policy which, according to its terms, is to be deemed continuous, until the first day of July, 1854. In other words, the power of the guaranty given is not to be deemed exhausted by any one or more consignments in favor of the parties named in the pass-book, but the same is to be kept in force as a valid policy for all the consignments by all the parties named, until July 1, 1854. The policy is to be continuous, unbroken, drawn out, and extended over all the subject-matter until July 1. 1854. It covers shipments by the individuals named for every boat that should descend the river, and for any amounts of cotton owned by them. It can be continuous in no other way. It is either exhausted by a single shipment, which is not claimed, or it is continuous and unbroken. I can see no middle ground.

It is said that this may increase the amount of the Defendants' liability greatly beyond the sum intended. That question may arise if a claim is made by some party whose insurance is beyond the amount prescribed in the original policy or its extension. It would be premature to discuss it now, inasmuch as it is conceded that the Plaintiff's claim, at the time the certificate was issued, was within the limit. His claim comes in as of that date, and cuts off those arising under later certificates,

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should that result be necessary to the enforcement of his claim. It is not impossible that, by the peculiar form of transacting the business at Appalachicola, the Defendants may have made themselves liable for a larger amount of insurance than they had contemplated. However this may be it is clear that the certificate to the plaintiff took effect on the 15th of November, 1853, when the renewal was made. There was no other time when it could take effect. It could not be when the risks were reported, for that was always after the risk had terminated. It could not have been when the goods were put on board the steamboats. This would involve greater embarrassment than the other alternative. It would be impossible for one assured to know whether his claim was good until an account was taken of what had been done by every party to whom a certificate had been issued. Day & Co. would never understand their own position; and, above all, a first applicant might have his insurance, which was good when he took it, rendered void by a shipment by some holder of a subsequent certificate of which he was ignorant, but whose goods were actually put on board before those of the first holder. Such a contsruction cannot be maintained. The ruling of the judge who tried the cause, and the affirmance thereof by the General Term, are correct, and the judgment appealed from should be affirmed.

GROVER, J.—The questions in this case arise upon the exceptions taken by the Defendants to the conclusions of law drawn by the judge at Special Term from the facts found. Among these conclusions, and the one principally discussed by counsel, is one to the effect that if at the time the certificate agreeing to insure what cotton should be consigned to Plaintiff until July thereafter was renewed to the Plaintiff in the fall of 1853, the power of J. Day & Co. to insure on account of Defendants was limited to the amount ofg $250,000, $500,000, or $750,000, no insurance made by J. Day & Co. after such renewal, for any other party, could be included in such amount. This certificate agreed to insure the Plaintiff upon all cotton thereafter consigned to him at Appalachicola, coming upon a certain class of

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steamers down the Chattahoochee River. It will be seen that the quantity was entirely indefinite. It might be large, or none at all. The agreement operated principally upon cotton thereafter to be shipped, and the risk did not attach, and no premium was payable until the cotton was shipped. This contract was, therefore, for insurance thereafter to be made. I think if the power was limited to a fixed amount, this Plaintiff could not, under said contract made by J. Day & Co. in November, insure other on cotton shipped consigned to him in February thereafter. If he could in this way effect sush a result, no one could safely rely upon an insurance made by Day & Co. after the issue of one certificate such as was renewed to the Plaintiff; for it would be possible that, during the time covered by the certificate, risks would attach under it to the entire amount. I think in case Day & Co. were limited in amount, and that contracts beyond such amount were binding upon the Defendants, that all contracts made before the amount was reached to which by their provisions the risks had attached, must be claimed valid, although the amount was exceeded by shipment thereafter made under certificates similar to the Plaintiff's, according to the facts found. There had been insured by Day & Co. before 1854, the time when the cotton in question was shipped, an amount equal to the policies and extension issued by the Defendants to them; and if they could only make contracts putting at the risk of the Defendants such amount, it would follow that the Plaintiff had no contract of the Defendants insuring the cotton in question, and could not therefore recover in this action. But the policies contain the following clause: "This policy is to be deemed continuous, unless otherwise directed by either party; thirty days' notice being given to the assured to enable the risks which had already attached previous to the receipt of notice by J. Day & Co. to terminate." This clause was inserted for some purpose. In its absence there can be no doubt as to the power of J. Day & Co. to make contracts of insurance to the amount specified in the policy, nor any doubt as to the right of the Defendants to revoke their power at any time, or of Day & Co. to throw up

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the agency when they chose. The clause could not have been designed for any of these purposes. A knowledge of the mode of transacting this kind of business at that point, which the Defendants are presumed to have possessed, will aid somewhat in its construction. That was to enter into contracts with parties having cotton shipped to them at times and in quantites unknown for its insurance; the risks terminating in about thirty days from the time of attaching. They also knew about the amount of this kind of business to be transacted. They therefore issued to Day & Co. a policy for $25,000, authorizing them to insure this amount for others, and by the above clause made it continuous—that is, authorizing Day & Co. to keep by their contracts this amount at the risk of Defendants; so that, when a risk terminated, its amount should no longer be included in the sum they were authorized to insure. This construction makes the Plaintiff's contract valid. It is not claimed that in February, when his cotton was shipped, there was anywhere near the amount of the limit then at risk. From the case it appears that there was no such amount at risk at any time. It may be claimed that the letter from Day & Co. to Defendants, advising that the amount was nearly reached, and the addition made thereto by Defendants, militates against this conclusion. I admit that the argument has some force, as tending to show by the subsequent act of the parties their understanding of the contract. But the fact that Day & Co. made contracts of insurance in gross beyond the amount specified, and that Defendants received premiums thereon, is an argument equally cogent in its favor. I think that this is the true conclusion. This disposes of all the other authorities in the case.

The judgment should therefore be affirmed.

Affirmed.

JOEL TIFFANY,
State Reporter.

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THE MECHANICS' BANK OF THE CITY OF NEW YORK, RESPONDENT, v. JOHN STRAITON, CHARLES G. SANFORD, AND THOMAS J. RAYNOR, APPELLANTS.

Negotiable Paper— Fictitious Payee construed as Bearer.

Where negotiable paper is made payable to a fictitious payee, it is to be construed as made payable to bearer.

APPEAL from a judgment of the Supreme Court, rendered at General Term, in the Second District, affirming a judgment at Special Term overruling a demurrer.

The action was brought by the Respondents as the holders of a check payable to "bills payable or order," against the Appellants as drawers.

The complaint alleges that the Appellants drew the check, and that it was afterwards for a valuable consideration transferred and delivered to the Respondents, whereby they became and are the holders and owners of it.

The Appellants demurred on the grounds—1st. That the check is an irregular instrument, not negotiable, and void. 2d. That the complaint does not state facts sufficient to constitute a cause of action.

SCRUGHAM, J.—The rules which establish the negotiability of commercial paper apply to bank checks as to other bills of exchange, and the doctrine that when such instruments are made payable to the order of a fictitious payee, they are to be construed and treated as payable to bearer, is too well settled to admit of serious question. In the great case of Gibson *v.* Minet (1 H. Bl. 569), the determination proceeded upon the ground that, according to the true intent and meaning of the parties, the bill was intended to be made payable to bearer.

The words, "or order," "or bearer," and "bearer," in notes or bills, are words of negotiability without which or other equivalent words the instrument will not possess that quality, and therefore the use of either of these expressions by the

Pleadings—Bills and notes. 75 *St. Rep.* 533; 1 *N. Y. Supp.* 608 (14 *Civ. Proc.* 428).

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drawer of a bill or maker of a note, must be regarded as indicating his intentions that the paper shall be negotiable.

By naming the persons to whose order the instrument is payable, the maker manifests his intention to limit its negotiability by imposing the condition of endorsement upon its first transfer. But no such intention is indicated by the designation of a fictitious or impersonal payee, for endorsement under such circumstances is manifestly impossible; and words of negotiability, when used in connection with such designations, are capable of no reasonable interpretation except as expressive of an intention that the bill shall be negotiable without endorsement; *i. e.,* in the same manner as if it had been made payable to bearer.

It was not before the Code necessary for the holder of an instrument payable to bearer, to allege or prove in an action against the maker the transfers through which he derived his title (2 Greenleaf on Ev., § 161, and cases there cited; 3 Phillips on Ev., 4 Am. Ed. 191); and it certainly is not now.

The engagement is to pay to the bearer; and that the Plaintiff is such, is one of the material elements of his cause of action.

That fact must, therefore, be stated in his complaint, and its statement wili be a sufficient allegation of his title; for it is the fact, and not evidence of the fact, which is required to be pleaded.

It is not only stated in the complaint in this action that the Plaintiff is the holder and owner of the check, but also that it was transferred and delivered to him for a valuable consideration, and that he became its owner and holder by virtue of that transfer and delivery. This cannot be true unless the drawer of the check transferred and delivered it directly to the Plaintiff, or to some other person by or through whom it was transferred to the Plaintiff; and this averment, if an allegation of a transfer and delivery by the drawer is necessary, is sufficient on demurrer within the cases of The People ex rel, Crane *v.* Ryder (2 Kernan, 433), and Prindle *v.* Caruthers (15 N. Y. R. 425).

The judgment should be affirmed.

All the judges concurring. Judgment affirmed.

JOEL TIFFANY,
State Reporter.

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WILLIAM M. MALLORY v. THE TIOGA RAILROAD COMPANY.

Evidence—Request to Charge—Nonsuit.

Where, on trial before a jury, the Judge assumes that a fact is proved, if the party desires such question to be submitted to the jury, he should so request it to be done; and not doing so, he cannot except on that account.

Where there is evidence tending to prove or disprove material portions of the Plaintiff's claim or Defendant's defence, the Court can neither nonsuit the Plaintiff, nor direct a verdict for Defendant.

BOCKES, J.—The Plaintiff claimed to recover in this action for transporting and distributing cross-ties, iron rails, chairs, and spikes, along the line of the Defendants' road, intended for use in its reparation. But the justice at the trial limited the right of recovery to the transportation and delivery of cross-ties only, holding that the rails, chairs, and spikes were transported and distributed under an agreement with the Plaintiff and Bostwick, that service was to be without charge, in consideration of the free use of the Defendants' road during the period of transportation.

The question now is, whether the recovery by the Plaintiff for the transportation and distribution of the ties can be sustained. At the close of the evidence the Defendants' counsel requested the Court to direct a verdict for the Defendants, on th ground that the evidence was insufficient to enable the Court or jury to determine the extent or amount of Plaintiff's claim for services; and also asked the Court to rule that the Plaintiff's claim was barred by the statute of limitations.

Submission to jury—Exception—Necessity. 49 *N. Y.* 93; 66 *N. Y.* 517; 9 *Hun,* 8; 8 *Misc.* 848 (59 *St. Rep.* 230; 28 *N. Y. Supp.* 726); 31 *Misc.* 828 (64 *N. Y. Supp.* 382); 4 *Daly,* 222; 15 *Daly,* 526 (29 *St. Rep.* 151; 9 *N. Y. Supp.* 509); 30 *St. Rep.* 429 (9 *N. Y. Supp.* 509); 37 *St. Rep.* 353 (13 *N. Y. Supp.* 829); 39 *St. Rep.* 94 (14 *N. Y. Supp.* 886); 35 *Super. Ct.* 230; 46 *Super. Ct.* 531.

Limitation of action—Foreign corporations. 76 *Hun,* 447 (59 *St. Rep.* 182; 28 *N. Y. Supp.* 106).

Appeal—Nonsuit—Exception. 47 *App. Div.* 541 (62 *N. Y. Supp.* 509); 13 *Daly,* 59.

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The learned judge before whom the trial was conducted properly declined compliance with these requests. The point in regard to the statute of limitations is not now urged. It seems that the services were rendered in June, July, and August, 1852, and this action was commenced July 17, 1858, less than six years from the termination of the services. Besides, the Defendants are a foreign corporation, and consequently cannot avail themselves of the statute of limitations (Olcott *v.* The Tioga R. R. Co., 20 N. Y. 210).

Nor could the judge have properly directed a verdict for the Defendants on the ground that the evidence was insufficient to enable the Court or jury to determine the extent or amount of the claim. There was evidence that the Plaintiff performed the services, and also evidence as to its value. The extent of the services and the amount to be allowed, therefore, were subjects for the consideration of the jury. In such case the Court can neither nonsuit the Plaintiff nor direct a verdict for the Defendants (Van Rensselaer *v.* Jewett, 2 N. Y. 135).

There was evidence given, showing that the transportation of the rails, chairs, and spikes was provided for in a lease of the road to Bostwick and the Plaintiff, wherein it was agreed that the transportation of those articles was to be without charge, in consideration of the use of the road during the period of transportation.

The contract of lease was evidenced by a letter from the president of the road to Bostwick and Mallory, and an endorsement thereon by Bostwick. The Defendants' counsel offered to prove the term of the lease by parol. This was excluded on the ground that the agreement appeared to be in writing. The letter and the endorsement thereon should be read together. The letter had been put in evidence and carried with it the endorsement, which, in the absence of any explanatory proof, must be deemed to constitute a part of the paper on which it was written; especially as it related in direct terms thereto, bore the same date, and purported to be a material and substantial part of it. Read together, the papers evidenced a perfect contract, the terms of which of course could not be contra-

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dicted or varied by parol proof. The offer was, therefore, properly overruled.

The purpose of the evidence offered doubtless was, although not stated, to show that it was agreed that the ties, as well as the rails, chairs, and spikes, were to be transported without charge. If so, it was an attempt to introduce into the written contract a new condition changing its import and effect in a very material sense—hence inadmissible.

In regard to the Defendants' set-off, the learned judge held that the evidence showed that the claim was settled, or if not settled, that it was barred by the statute of limitations.

There was evidence tending to prove, if not definitely and clearly proving, that the Defendants' claim interposed as a set-off was settled. The judge assumed, when called upon to speak on that subject, that the fact stood proved.

If dissatisfied with such assumption, the party should have requested to have that question submitted to the jury. In the absence of such request, the party will be deemed to have acquiesced in the assumption of fact stated by the Court (Barnes *v.* Perine, 12 N. Y. 18, 23; The People *v.* Cook, 8 N. Y. 78; Dowes *v.* Rush, 28 Barb. 157, 180; Nolton *v.* Moses, 3 Barb. 31; Winchell *v.* Hicks, 18 N. Y. 558). If dissatisfied with the conclusion of fact stated by the judge, the party should ask to have the question submitted to the jury. Without such request, an exception to the ruling of the Court only brings up the question of law based on his assumption of fact.

As the case is here presented, it must be deemed to be an accepted fact, as stated by the judge, that the Defendants' claim for set-off had been settled; hence it could not be allowed in this action. I will add, however, that the facts proved fully justified the conclusion expressed by the learned judge on the trial, and it is equally clear that the claim was barred by the statute of limitations.

But the views above expressed render further examination of the case unnecessary.

The judgment should be affirmed.

All concur in the above opinion.

JOEL TIFFANY,
State Reporter.

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ABRAHAM B. VANBENTHUYSEN, APPELLANT, *v.* MILTON SAWYER AND CHARLES H. FAXON, RESPONDENTS.

Tax-Sales of Land—Invalid of Information refused.

Where land has been sold for taxes, and the public officer refuses to do his duty in giving the party the necessary information to enable him to redeem—and thereby redemption is prevented—the deed of such officer will convey no title to the purchaser.

But if such officer has already given the necessary information by furnishing a bill of the amount to be paid, his refusal to furnish a second bill is not of itself evidence of official neglect.

PARKER, J.—This is an action to recover damages for an alleged wrongful entry upon, and carrying away timber from, lot No. 72, in Hoffman's township, in the county of Essex. Upon the trial, the verdict was for the Defendants, upon which judgment was rendered. The Plaintiff appealed to the General Term, when the judgment was affirmed, and the case is brought here by appeal from the judgment thereupon entered.

The Plaintiff claims title to the lot, which was a wild lot, under a tax sale, made by the treasurer of the county of Essex, on the 6th of December, 1853.

The Defendants dispute the title, on the ground that the owner of the lot, before the time for redemption expired, applied at the comptroller's office for a statement of the amount necessary to be paid to redeem the lot in question, and was then and there ready and willing and offered to pay such amount, but was refused such statement, and was thereby prevented from redeeming the premises; and claim that the deed subsequently given, pursuant to the sale, was therefore invalid, and conveyed no title to the Plaintiff.

Upon the trial, Schoonmaker, a witness on the part of the Defendants, testified that he went to the comptroller's office, on behalf of, and by direction of Bergh (the owner of the lot), to

Tax deed—Void—Failure to give notice. 114 *N. Y.* 22 (22 *St. Rep.* 158) 176 *N. Y.* 427; 4 *St. Rep.* 35.

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pay taxes. He says: "I went to the comptroller's office, and found a man there, and told him I wanted to pay taxes on No. 72, Hoffman's township, Essex county. His name is Sawyer; he is now in court. He asked me if Mr. Bergh sent the bill. I told him he did not. He said Bergh ought to have sent the bill. My reply was that Mr. Bergh did not send the bill, but if he would give me the amount I would pay it. He said Bergh should have sent the bill; that he had given them already a great deal of trouble. He refused to give me any attenion. I insisted upon their showing me the books, and knowing the amount. He went and opened the book, and I saw the amount, and he called out the amount. It was three dollars and something, and he closed the book, and said there were other back charges, and that he ought to have sent the bill or come himself and had the thing attended to. I took out my pocket-book and told him I came to pay the taxes and charges on the lot, and was prepared to pay, and said, 'I demand from you the amount.' He made no further reply, and I left the office." It had already appeared that Bergh had himself, after the tax sale, applied at the office to pay arrears of taxes on the lot, and had paid the bill made out therefor, but that an omission had been made, of which a statement was subsequently, and prior to Schoonmaker's application, sent to him in the form of a certificate of the amount necessary to be paid to redeem the lot.

The Court charged the jury that "if they believed the evidence of Schoonmaker, and that Schoonmaker applied to a clerk in the office of the comptroller, having charge of the books of sales for taxes, for a statement of the amount that was necessary to be paid to redeem lot No. 72 in question, and said clerk refused to give him said statement, that refusal defeated the title of the Plaintiff, and he cannot recover in this action."

To this the Plaintiff excepted.

It must be admitted, I think, that if the redemption was *prevented* by the public officer through whom it was to be effected, the title was not diverted by the deed made to the purchaser upon the tax sale and the Plaintiff therefore had no title and could not recover.

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But assuming all that the Court submitted to the jury to be true, it does not follow that a redemption was thereby prevented. It is to be remembered that there is evidence in the case showing that Bergh had received from this officer the very statement which he now again sought to obtain. In this case, it was erroneous, I think, to instruct the jury that the refusal of the clerk to give Schoonmaker the statement of the amount necessary to be paid to redeem the lot in question, defeated the title of the Plaintiff; for it cannot be correctly affirmed that every such refusal has such effect. Although it is made the duty of the comptroller from time to time to give any person, requiring the same, a certificate of the amount of any tax, interest, and charges due on any tract of land, yet the omission to do so may be under circumstances which would preclude the effect of preventing a redemption. If the applicant has in his pocket a certificate on which he can pay the required amount to the treasurer, the refusal of a second certificate would not put him in the predicament assumed by the charge.

In this case the Court had no right to assume that the omission of Bergh to redeem, was chargeable to the default of the public officer, sworn to by Schoonmaker.

This question, I think, is legitimately before us. We are called upon, by the exception to the charge, to decide whether it was legally correct in its application to this case. And if it made the case to depend upon a legal conclusion not warranted in the case, under all the evidence it was erroneous, and the Plaintiff's exception was sufficient.

I am of the opinion, therefore, that the judgment appealed from should be reversed, and a new trial ordered.

Concurring in this opinion: HUNT, BOCKES, WRIGHT, and DAVIES, Ch.J.

Reversed.

JOEL TIFFANY,
State Reporter.

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THE PEOPLE OF THE STATE OF NEW YORK, APPELLANTS, *v.* ALDEN VILAS, ET AL., RESPONDENTS.

Addition to Fund in charge of Commissioners does not release Sureties.

An addition to the capital of the fund placed in charge of the Commissioners by Act of April 10, 1850, does not discharge the sureties of such Commissioners from liability on their official bond.

This action was brought against the Defendants who were sureties upon the official bond of M. P. Jackson, as loan commissioner of the county of St. Lawrence, for loaning the moneys of the United States deposited with the State.

The bond was dated June 15, 1850. The questions of law that arose upon the trial at circuit were whether a judgment of nonsuit rendered in an action previously brought for the same cause, barred this action; and whether the additional duties imposed upon the commissioner by the Act of April 10, 1850, discharged the sureties.

It appeared in the present case that by the operation of that Act five hundred dollars was added to the capital of the fund in charge of the commissioners of St. Lawrence county, which, prior thereto, was upward of eighty thousand dollars.

The cause was tried by Court without a jury, and upon the above grounds judgment was rendered for the Defendants, which upon appeal to the General Term of the Fourth District

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Surety—Discharge—Modification. 60 *N. Y.* 160, 427; 61 *N. Y.* 360; 98 *N. Y.* 472; 4 *Keyes,* 256; 3 *Abb. App. Dec.* 268; 25 *Hun,* 284; 92 *Hun,* 171 (71 *St. Rep.* 206; 36 *N. Y. Supp.* 367); 2 *App. Div.* 161 (73 *St. Rep.* 561; 37 *N. Y. Supp.* 942); 53 *Barb.* 150.

Bonds—Public officers—Change of duties of—Liability of sureties. 92 *N. Y.* 295; 99 *N. Y.* 141; 5 *Misc.* 528 (58 *St. Rep.* 102; 25 *N. Y. Supp.* 986); 2 *Abb. App. Dec.* 401; 35 *How. Pr.* 409; 2 *How. N. S.* 339.

Judgment—Conclusiveness—Nonsuit. 51 *N. Y.* 393; 77 *Hun,* 32 (59 *St. Rep.* 436; 28 *N. Y. Supp.* 238; 23 *Civ. Proc.* 415); 59 *Barb.* 488; 7 *Rob.* 450; 51 *Super. Ct.* 377.

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was affirmed upon the latter ground, from which the Plaintiff appealed to this Court.

J. H. Martindale, Attorney-General, for Appellants.

J. C. Brown for Defendants.

GROVER, J.—Judgment of nonsuit in the previous action was no bar (Brintnall *v.* Foster, 7 Wend. 103; Audubon *v.* Ex. Ins. Co., 27 N. Y. 216). Such was always the rule in actions at law. In equity suits the rule is different. A decree dismissing the complaint, unless made without prejudice, bars a second suit for the same cause.

The real question in this case is whether the addition made to the capital of the fund placed in charge of the commissioners by the Act of April 10, 1850, discharged the sureties upon their official bonds. An examination of that act will show that it contains no provision effecting such a result, unless it is produced by this addition thereby made to the capital of the fund. This presents a question of vast importance to the public. It not only affects all the official bonds of all this class of commissioners holding office at the time of the passage of the act, but an examination into the matter would, I think, show that it affected a great number of official bonds in other cases. This consideration cannot change the law if settled in favor of the sureties, but the obvious inconvenience of a rule working such results requires a thorough examination of the reasons and authority upon which it is claimed to be established. As between private parties, the law is, that any alteration in the obligation or contract in respect of which a person has become surety, without the consent of the latter, extinguishes his obligations and discharges him (Burge on Suretyship, 214; Theobald Sur. 134; Whitcher *v.* Hall, 5 Barn. & Cress. 269). And this result follows irrespective of the inquiry whether the alteration could work any injury to the surety or not (Bangs v. Strong, 4 Com. 315). The reason upon which this rule is founded is, that the surety has never made the contract upon which it is sought to charge him. His answer is, if it is sought to charge him upon the altered contract, that I never made any such bargain; and if upon the original contract, that such contract no longer exists,

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having been legally terminated by the altered or substituted contract made by the parties. In either contingency the answer furnishes a complete defence. It is claimed by the Defendants that the same rule is applicable to official bonds. In this they are right if the reasons apply, and the same answers can be given.

An official bond is a contract with the people for the faithful discharge of the official duties of the officer. In the present case it was that Jackson should faithfully discharge the duties of said commissioner, pursuant to the act entitled "An act authorizing a loan of certain moneys belonging to the United States, deposited with the State of New York for safe-keeping," and should discharge his said duties without favor, malice, or partiality. These duties Jackson has not performed, but the securities claim to be discharged on the ground that subsepuent to the making of the bond, five hundred dollars was added to the capital of the fund. The duties of the commissioner as to this five hundred dollars were precisely the same as required for the capital of the fund, and precisely those required by the act referred to in the bond. The position of the Defendants must go to the extent that any alteration made by the legislature in the act affecting the duites of the commissioner, will discharge his sureties. In other words, that the bond is to be regarded as a contract faithfully to discharge the duties of the office as then prescribed by the act, and that any alteration in these duties made by the legislature subsequently, alters the contract, and hence discharges the sureties. If this position be sound, it follows that no charge can be made by the legislature relative to the amount of money in their hands, the mode of loaning it, their compensation, or their duties in any respect, without discharging their official bonds. It may be remarked that it would not only relieve the sureties upon the bond, but the officer himself, unless it should be held that his continuance in office after the passage of the act making the change, was an assent on his part to such change. The analogy between this class of cases and the contracts of individuals fails in this respect. In the latter, no alteration can be

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made without the mutual assent of both parties. In the former, the legislature have power at any and all times to change the duties of officers, and the continued existence of this power is known to the officer and his sureties, and the officer accepts the office, and the sureties execute the bond with this knowledge. It is, I think, the same in effect as though this power was recited in the bond. Had this been done, it would not be claimed that the sureties were discharged by its exercise. Had an individual given a guaranty of the faithful performance of a contract by one party, containing a clause authorizing the other to make alterations in certain of its provisions, it would not be claimed that the surety was discharged by alterations so authorized; and yet this is nothing more than the sureties knew the legislature was competent to do in the present case. Why has it never been claimed in behalf of officers who had given bonds for the discharge of their officiel duties, that a contract had been made with them in relation thereto, unchangeable by the legislature? Simply because it is understood that all these acts are subordinate to the law-making power, and necessarily subject to such changes as may from time to time be deemed expedient. Every official oath is so interpreted. It is not true that one taking an oath to discharge the duties of any office simply swears to discharge them as then prescribed by law, but that he swears to discharge them as they may from time to time be fixed and regulated by the lawmaking power. So an official bond conditioned for the discharge of the duties of the office, should in like manner be understood, not as restricted to duties as then prescribed by law, but as embracing the duties of the office as from time to time fixed and regulated by the legislature. It may be said that although such might be the general rule, yet that the bond in the present case contains a reference to the act, and requires the duties to be performed in accordance therewith. To this it may be answered that section 3 of the act providing for giving the bond and its requisites, requires no such reference, and that the bond in suit in addition thereto contains all required by it; that is, the true and faithful performance of its duties without favor, malice, or partiality. The act does not prescribe the amount of money to be placed in, or

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which shall remain in the hands of the commissioners. In the absence of authority determining the question otherwise, my conviction is that any alteration, addition, or diminution of the duties of a public officer, made by the legislature, does not discharge his official bond, or the sureties thereon, so long as the duties required are the appropriate functions of the particular office; that all such alterations are within the contemplation of the parties executing the bond; that imposing duties of another description and not appropriate to the office would discharge the sureties, not coming within such contemplation.

The question was regarded by the Supreme Court as settled in favor of the sureties by a series of decisions: if this be so, it is equally binding upon this as upon any other Court. No case holding any such doctrine has been decided by the Courts of this State. Neither the opinion of the learned justice, nor the brief of the counsel, contain any reference to any case in this State where the point has been involved, nor have I been able to find any such case. Bonar v. Macdonald (1 Eng. L. & Eq. 1), was a case between private parties, a bank and its agents, where the duties and responsibilities of the latter were increased by the bank, and has therefore no application to the present case. The same may be said of the The North-Western Railway Co. *v.* Whinray, a contract between the company and its agent. In Oswald v. Mayor, &c. (26 Eng. L. & Eq. 85), the question was whether the bond embraced a new appointment to the office. Bartlett *v.* Attorney-General (Sir Thomas Parker's R. 277) was the case of a new deputation, new security given for the additional duty. Pybus v. Gibb (38 Eng. L. & Eq. 57), is the only case where the question presented for judgment in the present case was directly involved. In that it was held that the sureties of a baliff of a county court were discharged on the ground that his powers had been enlarged, and his responsibilities increased. The Court do not appear to have considered the point whether there was not a well-grounded distinction between official bonds and contracts of private parties. There have been several cases in this country where it has been held that a subsequent change of the duties of an officer does not discharge his sureties. In White *v.* Fox (22 Maine Rep. 341),

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it was held that a change in the duties of a clerk of the Court did not discharge his sureties, the Court saying that the sureties were bond for the faithful discharge of the duties of the office; that is, for the faithful discharge of such duties as the laws for the time being should require to be performed by the clerks of Judicial Courts; and further, that there was but little similarity between such cases and those arising out of offices or trusts regulated by contracts. The People *v.* McHatton (2 Gilman's Rep. 638), it was held that a legislative extension of the time for paying over the taxes of three weeks did not discharge the sureties of the officer. State v. Carleton (1 Gill. Md. 249) is a similar case. In Kindle *v.* State (7 Black, 586), a similar rule was applied when the time for payment by a county treasurer was extended. In Colter *v.* Morgan's adm'rs (12 B. Monroe, 278), it was held that sureties were bound, although the taxes were increased after the giving of the bond. In Marney *v.* State (13 Missouri, 7), it was held that sureties of a sheriff were bound for the performance of new duties created after giving the bond. Bartlett v. Governor (2 Bibb Ky. 586), a similar ruling was made. Other similar cases might be cited, but those already cited I think sufficient to show that a legislative alteration of the duties of an officer do not discharge his sureties so long as the duties remain appropriate to the office.

My conclusion is, that the judgment should be reversed and a new trial ordered, costs to abide event.

HUNT, J.—On the 15th day of January, in the year 1850, Mahlon Jackson was appointed one of the commissioners for the county of St. Lawrence, for loaning certain moneys belonging to the United States, desposited with the State of New York for safe keeping. The appointment was made in pursuance of the provisions of chapter 150 of the laws of 1837. (Laws 1837, p. 121.) The Defendants became sureties for said Jackson in the bond executed by him under the said act. The act required the bond to be in a penalty named, and to be conditioned "that if the above bounden (Jackson) shall well, truly, and faithfully perform the duties of said commissioner, pursuant to the act entitled 'An act authorizing a loan of certain moneys belonging to the United States, deposited with the State

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of New York for safe-keeping,' and shall discharge his said duties without favor, malice, or partiality, then this obligation to be void, otherwise to remain in full force and virtue." (P. 126, § 20.) The bond was executed in conformity with this statute. The statute provided for the distribution of certain moneys received by the State from the Federal government among the different counties of the State according to their population, for the purpose of being loaned to the people of the said counties in the manner therein specified. The duties of the commissioner, whose appointment was therein provided for, consisted, generally, in receiving the said moneys from the State, in loaning them upon bond and mortgage, collecting the interest thereon yearly, and the principal from time to time as it might become payable, reinvesting the principal, and paying the interest to the State. The act contained much detail, but the substance of the duties of the commissioners is as I have stated. The commissioner, Jackson, and his colleagues, received under this act the sum of about $80,000 in bonds and mortgages and cash. The State had also in 1792 and in 1808 made certain loans to the people of the different counties, of its own moneys, and had appointed commissioners to attend to the same, whose duties were of the same general character as those appointed under the act of 1837 referred to. In April, 1850, the State determined to close up the business of the commissioners under the loans of 1792 and 1808, and provided that it should thereafter be transacted by the commissioners appointed under the act of 1837. (Laws 1850, ch. 337, p. 732.) The fifth section of this act provided that the mortgages thus transferred should "form a part of the capital of the United States deposit fund, and the said commissioners for loaning certain moneys of the United States, shall exercise the same powers in relation to such mortgages, in the collection of principal and interest thereon, and in proceedings in case of default, and shall receive the same compensation therefor, as if said mortgages had been originally executed" under the act of 1837. Under this authority, securities or moneys to the amount of $500 were received by Jackson and colleague. Upon the termination of his office, in 1853, Jackson was in de-

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fault in his accounts to the State, in the sum of $2,134.59. This action was brought to recover the same from the Defendants, who were his sureties. It was proved that of the default, $500 consisted of moneys received by virtue of the Act of April, 1850, and the residue was of moneys received under the original authority. The judge trying the cause, and the General Term of the Fourth District, held that the passage of the Act of 1850, and the transfer under is, vitiated and annulled the bond of the sureties of Jackson, and that no recovery of any part of the amount could be had against them. The correctness of their decision is the question now before us.

The Defendants are sureties simply, and must respond according to their bond, nor more nor less. It cannot be enlarged or extended, nor are we called upon to diminish it. The position to which Jackson was appointed, was that of a public officer. He was appointed by the Governor with the concurrence of the Senate. He was required to take the usual oath of office, and, in various sections of the act, the position is in terms designated as an office. The chief duty of his office was to receive and invest certain moneys intrusted to his care by the State. When the further sum of $500 was placed in his charge by virtue of the Act of 1850, it was in all respects subject to the same regulations and to be disposed of in the same way as the other moneys in his custody. No alteration was made in the nature, character, or duties of his office. An additional amount of duty, in every particular of the same nature as that already existing, was imposed upon the office (§ 5, *supra*). It was expressly enacted that the new securities should form a part of the capital of the United States deposit fund, and it was a portion of the original subject, so far as legislative power could make it such. In the language of the court in The Rochester City Bank *v.* Elwood (21 N. Y. R. 93), this "was within the range of the *class* of duties that might be appropriately assigned" to such an officer. It was not like the case of Bonar v. Macdonald (1 Eng. L. & Eq. R. 1), where a clerk in a banking house had been employed at a specific salary upon the agreement that he should embark in no kind of business or adventure, and the Defendants having become sureties for the

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faithful discharge of his duties, the Plaintiff increased his salary, upon his agreement to bear one-fourth of the losses to be incurred in the discounts obtained by him. The new agreement, it was held, created an entire change in the character of the business to be done by the principal, and was in direct violation of a part of the original understanding.: It changed entirely the character of the responsibility of his sureties, and the court held them to be discharged altogether.

So in The N. W. Railway Company *v.* Whinray (10 Exch. R. 77), the Defendant became surety in a bond, which recited that A B had been appointed clerk to a coal company, at a yearly salary of £100, and conditioned for the faithful accounting for all moneys received by him for the use of the company. After a time the company substituted for the salary a commission of 6*d.* per ton for all the coal on which he should obtain orders. On a suit against the sureties, it was held that the condition was restrained by the recital, and that the liability only continued while the clerk remained at the fixed salary. The present case more nearly resembles that of Pybus *v.* Gibb, 6 Ellis & Black, 902 (38 Eng. Eng. L. & Eq. 57), where a bond was executed by G. and two sureties, conditioned for indemnifying the high bailiff of the county court against liabilities from the misconduct in his office of G., who was appointed one of the bailiffs. At the time the bond was executed the duties of the office were regulated by 9 & 10 Vic., c. 95, and after the execution of the bond the jurisdiction of the county court was extended and increased by five additional statutes. It was held that these statutes so materially altered the nature of the office, that the sureties were no longer liable to indemnify the high bailiff, even though the misconduct of G. was in a matter in respect to which the duty of the bailiff had not been altered by the subsequent acts. Among other alterations were those giving bankruptcy jurisdiction, authorizing the arrest of absconding debtors, and an increase of jurisdiction from cases under £20 to cases involving £50, and by consent to any amount, and an entire change in the fees the bailiff was authorized to demand. In deciding the case, Lord Campbell, ch.J., says: "It may be considered settled law, that where there is a bond of suretyship for an officer, and by the act of the parties or act of parliament

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the nature of the office is so changed that the duties are materially altered, so as to affect the peril of the sureties, the bond is avoided . . . There being then an increase in the jurisdiction of the court as to amount, a change in the nature of the court by giving bankruptcy jurisdiction, and jurisdiction over absconding debtors, and the table of fees being altered, I think that the office is essentially changed, and the sureties no longer liable." Colerdige, J., says: "When the nature of the employment of the principal is so altered by the act either of his employer or of the legislature, that the risk of his surety is materially altered, the surety has the right to say, 'I did not bargain for this risk, I am discharged.' " After reciting the facts, Wightman, J., says: "It appears to me, therefore, that in this case the effect of the increased jurisdiction was so to alter the court and the office of bailiff, as to effect the liability of the surety to his prejudice."

A case is cited in the opinion of the Supreme Court from Parker's Reports (Bartlett *v.* Attorney-General, Park. R. 277), to the effect that a person who had become surety for a collector of the customs revenue, upon his appointment in 1691, was held not liable in respect of customs which were first imposed in 1698. This doctrine would annul the bond of every canal collector in the State, or of every collector of customs or of internal revenue in the United States, whenever the government made any change in their rates or duties. If the imposition of duties on different subjects, or an alteration of rates, will produce this result, it is a waste of time and paper to execute such bonds. They are utterly worthless. But it is not certain that this is the rule of law. A public officer takes his office, with the obligation to perform all the duties incident to or connected with it then existing, or that may be added by the legislature, provided the nature and character of the duties remain the same. The obligation of his sureties is the same. The imposition of duties of the same nature and character, or the withdrawal of portions of them, pertain to the position. It is indispensable to the proper management of public affairs, and serious injury to the public interests would occur were the rule otherwise. The obligation is for a faithful performance by the principal of all the duties of the office during the term of his

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apppointment, not of the duties as they exist at any particular moment. His duties vary with the requisitions of the statute, and whatever the statute imposes or withdraws becomes or ceases to be a part of his duty. The only limitation to this rule is that the duties imposed shall be of the same general nature and character. Many cases are cited from the Western Reports establishing this precise principle, for which *see post.* and see also White *v.* Fox (22 Maine Rep. 341). The additional duty imposed upon Jackson and his associate commissioner, by the Act of 1850, was plainly of the same nature and character as the duties belonging to the office when the sureties executed their bond. It was simply to receive, invest, and pay the interest on an additional amount, at the same time, in the same manner, and subject to the same regulations, as were prescribed in respect to the moneys already in their hands. The additional amount in the present case was $500.

The case of United States *v.* Kirkpatrick (9 Wheatton R. 720), is in apparent conflict with these views. It is not cited by the Respondents' counsel, or by the court below, and there may be some distinction between the cases which does not occur to me. I do not find that it has ever been recognized or affirmed. I cannot consider it sound, or practicable in the administration of the affairs of government.

If, however, this statute did alter the nature and duties of the office of commissioner, in the manner alleged by the Respondent, so that the peril of the sureties was increased, did it operate to release them entirely, or only as to liabilities arising from such additional duties? The case of the sureties of an officer is not precisely the same as if their principal was a party to an ordinary civil contract. His position is rather that of an agent or servant of the government, than a contracting party. Certain duties were imposed upon commissioners by the laws in existence prior to 1850, when the sureties assumed their responsibility. A subsequent law imposing additional duties does not impair the prior laws, or the obligations under them. Herein the present case differs from the most of the authorities cited, which were cases of contract simply. The altered contract in those cases takes the place of, and entirely ends, the original contract; and if the party is not a surety upon the

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amended contract, he is so upon none, for none other is in existence. In the present case the superadded duties have not affected the original duty. It remains in force, and the obligation for its performance is the same as if no new law had been passed. Why should not the obligation of the sureties for the original duty also continue? The case of Bonar *v.* McDonald (1 Eng. Law & Eq. 1), was the case of a civil contract for the performance of the duties of a bank agency; and when the new contract was made that the principal should bear one-fourth part of the losses, the original contract of employment was cancelled. Not being parties to the new arrangement, there was, therefore, nothing to which the obligation of the sureties could attach. The N. W. Railway *v.* Whinray (10 Exch. R. 77), was a private contract of the same character. Oswald *v.* Mayor of Berwick-upon-Tweed (3 Ell. & Bl. 653; 26 Eng. L. & Eq. 85, and cited in various other places), is not an authority upon this point. The liability was held on the ground that the change in the tenure of the office was provided for in the bond itself, and that the sureties could therefore take no exception to it. Pybus *v.* Gibb (6 El. & Bl. 902; 38 Eng. L. & Eq. 57), is more in point. It was, however, decided upon Bonar *v.* MacDonald, and Oswald *v.* Mayor &c., *sup.*, also upon the ground that the *duties of the office* had been essentially altered, and the distinction between a civil contract which is ended and an obligation imposed by law, which still continues, is not adverted to. So in Miller *v.* Stewart (9 Wheaton, 680), there was but one instrument of appointment, and when altered in an essential part, it ceased to be the obligation of the sureties, and all liability on their part ceased. The position I have stated is sustained by the following cases: In Colter *v.* Morgan (12 B. Monroe, 278), and in Marney *v.* The State (13 Missouri, 7), and in Bartlett *v.* Governor (2 Bibb. 586, Ky.), and in Walker *v.* Chapman (22 Ala. 116), and in Grayham *v.* Washington County (9 Dana, 182), and in Governor *v.* Ridgway (12 Ill. R. 14), and in Compher *v.* People (12 Ill. 290), sureties were held to be liable in cases like the one now under discussion.

New trial should be had.

All concur. Reversed.

JOEL TIFFANY,
State Reporter.

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WILLIAM J. BLYDENBURGH, EXECUTOR, &c., APPELLANT, v. HORACE THAYER, RESPONDENT.

Non-negotiable chose—Assignee takes subject to all Equities.

The assignee of a chose in action not negotiable takes subject to all equities, and can acquire no greater or other rights than those possessed by his assignor.

G. Miller for Appellant.
Watson & Stone for Respondent.

DAVIES, CH.J.—This action is brought to obtain a cancellation of a certain judgment against the Plaintiff's testator, now held and owned by the Defendant. A correct understanding of the facts found by the referee will be more readily attained by reference to those stated in the pleadings, and not controverted. The Plaintiff's testator made his certain note for the sum of $950, payable to the order of one Robert Stewart, and delivered the same to him. Stewart borrowed of one Amasa S. Foster the sum of $50, and transferred to him the said note as collateral security, before its maturity.

Foster commenced a suit upon the note, when over due, and recovered judgment therein against Plaintiff's testator. Defendant sold to Stewart, the payee of the note, certain property, for which he took in payment an assignment of said judgment from said Foster, and which was procured from him by said Stewart as repayment to said Foster of the sum of $50, advanced by him to said Stewart, and the interest thereon, and the costs of said judgment.

The referee before whom the action was tried found as facts:

1. That the note upon which Foster recovered judgment against Blydenburgh was, before it was due, endorsed over by Stewart, the payee, as security for $50 borrowed money.

Chose in action—Non-negotiable—Assignment—Equities. 39 *How. Pr.* 354; 47 *Super. Ct.* 419.

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2. That the note was lent by Blydenburgh to Stewart for his accommodation.

3. That Stewart, at the time the note was given, was largely indebted to Blydenburgh for money lent and money paid to his use, and such indebtedness still remains.

4. That the Defendant paid Foster his $50 with interest and costs when the judgment was assigned to him.

5. That such payment was made as part of the purchase money agreed to be paid to Stewart by the Defendant for the judgment, and the judgment was assigned to the Defendant by Foster at Stewart's request, and without any notice or knowledge on the part of either Foster or the Defendant that Blydenburgh had any defence or set-off against the judgment, or the demand on which it was recovered, and that the Defendant paid full value for the judgment. The referee thereupon gave judgment for the Defendant that the Plaintiff's complaint be dismissed with costs, and which judgment on appeal was affirmed at the General Term. Upon the facts found by the referee it is immaterial to inquire whether the Plaintiff's testator had a good defence to the action upon the note instituted by Foster. The interest of Foster in the note and judgment was only to the extent of the $50 advanced by him to Stewart, and the costs of the action; on payment of these sums to him by Stewart, he was entitled to a transfer of the judgment. Stewart was, therefore, the equitable owner of the judgment, subject to the lien of Foster thereon, and his interest therein to the extent of these amounts.

The referee found as a fact that the note was endorsed by Stewart to Foster, "as security for $50 borrowed money."

It then becomes necessary to inquire what were the equities between Stewart and the Plaintiff's testator. They are settled by the finding of the referee. He finds that the note was lent by Blydenburgh to Stewart for his accommodation, and that Stewart, at the time the note was given, was largely indebted to Blydenburgh for money lent and money paid to his use, and that such indebtedness still remains.

It is too clear to need argument or illustration or authority

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that Stewart could not enforce this judgment against the estate of the Plaintiff's testator. The next inquiry is, Does the Defendant, who is the assignee of Stewart of the whole judgment except as to the amount paid to Foster, stand in any better position than Stewart? This question has been repeatedly answered by adjudications in this Court (Callanan *v.* Edwards, 32 N. Y. 483; Bush *v.* Lathrop, 22 N. Y. 535; Anderson *v.* Nicholas, 28 N. Y. 600; Beebe *v.* Bank of New York, 1 Johns. 529).

These cases all affirm the doctrine that the assignee of a chose in action not negotiable, takes the thing assigned subject to all the rights which the debtor had acquired in respect thereto prior to the assignment.

The assignee takes subject to all existing equities; and these on the part of the Plaintiff's testator were, that the judgment could not be enforced against him to the amount due to Foster, and which was paid to him.

Nothing was done by the Plaintiff or his testator which estops him from settling up these equities as against either Foster, Stewart, or the Defendant. The judgment was only available in the hands of either of them to the extent of the $50 advanced by Foster, and the interest thereon, and the costs of the action. On payment of these sums, the Plaintiff or his testator was entitled to have the judgment cancelled.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

Reversed.

JOEL TIFFANY,
State Reporter.

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CHARLES H. VANDUSEN, AS RECEIVER OF PHILO HASKINS, v. DANIEL WORRELL.

Evidence—Deed may be proved Mortgage.

It is competent to prove that a deed absolute upon its face is in fact designed as a mortgage.

THIS was an action in equity, brought by the receiver of Philo Haskins, claiming to recover from the Defendant the proceeds of the sale of certain lands, or of the value thereof, with certain deductions, on the ground that the lands were conveyed to the Defendant by way of mortgage for the security of a certain debt. The Defendant claimed to be the absolute owner, and denied all liability. The referee found in favor of the Plaintiff, and the General Term of the Eighth District affirmed his judgment. The facts are more particularly stated in the opinion of the Court.

P. L. Ely for Appellant.
John T. Murray for Respondent.

HUNT, J.—On the 17th day of June, 1846, Philo Haskins, being the owner of about forty-eight acres of land, executed to the Defendant and one Joshua Worrell his mortgage upon the same, to secure the payment of two hundred dollars, and accompanied the same by his bond. On the 21st day of January, 1846, Joshua assigned his interest in the bond and mortgage to the Defendant. On that day the Defendant lent to Haskins a further sum of three hundred dollars, and Haskins and wife executed to him a warranty deed of the forty-eight acres. This deed was given as security for the three hundred dollars then loaned, and for the amount remaining unpaid on the bond and mortgage before mentioned. The Defendant and his wife afterward sold the premises to Wiliam B. Follett for the sum of fourteen hundred dollars. This action is brought, asking a

Equity—Restitution. 163 *N. Y.* 97.
Evidence—Deed as mortgage. 46 *N. Y.* 632; 3 *Lans.* 70; 7 *Lans.* 51.

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judgment that Worrell was a trustee of Haskins for the balance, after deducting the three hundred dollars loaned, the amount due on the bond and mortgage, with a reasonable compensation for the trouble of the Defendant, and that he be directed to pay over such balance. The referee found a balance of twelve hundred and twelve dollars to be due to the Plaintiff as receiver of Haskins, for which he rendered judgment in his favor, and the General Term of the Eighth District affirmed his judgment. The Defendant now appeals to this Court.

But a single question is presented for our consideration, to wit: was it competent for the Plaintiff to prove that the deed from Haskins to Worrell, although in form an absolute conveyance, was in fact, by the engagement of the parties, a mortgage merely? This question was decided in favor of the Respondent in Hodges *v.* Tennessee Marine and Fire Insurance Company (4 Seld. 416), and was again decided by this Court in the same manner, in June, 1866, not yet reported, in the case of Loveridge *v.* Oyer.

Judgment should be affirmed with ten per cent. damages.

All affirm.

PARKER, J.—The parol evidence admitted by the referee upon the trial, tending to show that the deed from Haskins to the Defendant was intended as a mortgage; was properly received (Hedges *v.* Tennessee Ins. Co., 4 Seld. 416; Sturtevant *v.* Sturtevant, 20 N .Y. R. 39).

The referee found the fact that it was intended as a mortgage, upon sufficient evidence. Hence lies conclusion of law that the Plaintiff was entitled to recover the money received by Defendant upon a sale of the premises, after deducting the sums and interest which it was given to secure and reasonable charges for effecting the sale, of which the Defendant has no right to complain.

The judgment appealed from should be affirmed with costs.

All affirm.

JOEL TIFFANY,
State Reporter.

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PETER M. McLAREN, APPELLANT, v. MARTIN McMARTIN, ADMINISTRATOR OF DANIEL McMARTIN, JR., DECEASED, RESPONDENT.

Statute of Limitations—Administrator's power— Code, § 110.

A payment upon a note of the intestate barred by the statute of limitations during his lifetime, by his administrator, does not take the same from under the statute.

The administrator has no authority to bind the estate by any such implied or express promise.

APPEAL from the Supreme Court. The action was on a promissory note for $100, made by the Plaintiff's assignor on the 19th of April, 1835, and payable one year from date. The suit was commenced on the 23d of September, 1854, eighteen years after the note matured, and seven years after the death of the maker, and the appointment of the Defendant as his administrator.

The complaint alleged, and the answer denied, two payments at different times by the intestate. It was alleged by the Plaintiff, and admitted by the Defendant, that on the 3d of March, 1848, the latter paid fifty dollars on the note. The defence was that the claim was barred by the statute of limitations.

On the trial at the Fulton Circuit, in September, 1855, it

Limitations—Statute—Payment or acknowledgment. 43 *N. Y.* 51; 4 *Hun,* 778; 9 *Hun,* 8; 26 *Hun,* 225; 27 *Hun,* 11; 7 *Misc.* 264 (58 *St. Rep.* 528; 27 *N. Y. Supp.* 1011); 4 *App. Div.* 477 (74 *St. Rep.* 489; 38 *N. Y. Supp.* 810); 72 *App. Div.* 608 (76 *N. Y. Supp.* 262); 39 *Super. Ct.* 226.

Limitations—Acknowledgement by executor. 53 *N. Y.* 445; 98 *N. Y.* 309; 176 *N. Y.* 527; 107 *N. Y.* 108 (11 *St. Rep.* 346); 41 *Hun,* 416 (3 *St. Rep.* 146); 51 *Hun,* 197 (21 *St. Rep.* 563; 4 *N. Y. Supp.* 936); 48 *Misc.* 56 (96 *N. Y. Supp.* 225); 61 *Barb.* 202; 15 *Abb. N. C.* 192; 3 *Lans.* 61; 7 *Civ. Proc.* 276; 2 *Dem.* 462; 3 *Dem.* 305; 5 *Redf.* 73.

Executors—Contracts—Liability of estate. 9 *Misc.* 231 (61 *St. Rep.* 297; 30 *N. Y. Supp.* 285).

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was proved that the note was owned by the payee in 1848 and 1849; and that he afterward transferred it to the Plaintiff. The note, as produced on the trial, and as presented to the administrator in 1849, bore the following endorsements: "May 18th, 1836, received $7." "Received one year's interest." "March 25th, 1847, received fifty-five dollars on this note." Each of these was in the handwriting of the payee, and it was not proved by him, or by any other witness, that any such payments were in fact made by the intestate.

The note bore also the following endorsement, which was in the handwriting of the Defendant: "March 3d, 1848, received fifty dollars on the within by the hands of Martin McMartin." It was not signed by the administrator.

The son of the Plaintiff, who on a previous trial had testified that this payment was made on the 3d of March, 1848, on the last trial testified that he was enabled, by circumstances which he had since recalled, to state that the payment and endorsement were made on the 3d of March, 1849. This evidence was received, under the objection of the Plaintiff that it was admitted by the pleadings that they were made on the 3d of March, 1848. The witness also testified that the Defendant promised verbally to pay the note.

The Court, upon these facts, directed a verdict for the Plaintiff, for $114.18, subject to the opinion of the Court at General Term. The Plaintiff moved for judgment on a case and exceptions, and the General Term in the Fourth District ordered judgment for the Defendant.

A. McFarlan for Appellant.
M. McMartin for Respondent.

PORTER, J.—The demand, for the recovery of which the action was brought, was extinguished on the 12th of April, 1842. It was neither continued nor revived by any act or admission of the maker. The endorsements written by the payee were mere declarations in his own favor, wholly unsustained by the proof. The fact that they were shown to the Defendant after the death of the maker, does not change their nature, nor

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impart to them the force of legal evidence. The underwritten endorsement proves the fact it states, but nothing as to antecedent payments or endorsements.

If, then, the extinguished demand was ever revived, it was by the act of the administrator, two years after the death of the maker, and seven years after the claim was barred. The statute of limitations having attached before the enactment of the Code, the contract could not be reinstated by any subsequent acknowledgment or promise, unless "contained in some writing signed by the party to be charged thereby" (Code, § 110, Esselstyn *v. Weeks,* 2 Kernan, 635).

The endorsement relied on by the Appellant is in these words: "March 3d, 1848, received fifty dollars on the within, by the hands of Martin McMartin." It does not constitute a new contract, either in form or in legal effect. It is precisely what it purports to be, a statement in his handwriting of the fact—the date and amount of payment, and the person from whom it was received. It proves this, and nothing more. It is not signed by the administrator; it contains no undertaking in behalf of the estate, and it neither affirms nor denies the existence of facts of which he had no personal knowledge. The endorsement shows precisely what the pleadings admit, that this payment was made by the Defendant; and the debt was not thereby revived, unless such payment was sufficient to revive it. The proof corrects the error in the date, and shows that the endorsement was in fact made a year after it purports to have been written.

The Code provides that the section above referred to shall not alter the effect of any payment of principal or interest (Code, § 110). The Appellant erroneously assumes that, under the antecedent rules of law, the effect of a partial payment by an administrator was to revive a demand extinguished in the lifetime of the intestate. Payment by the debtor personally, or by his direction and authority, is evidence now, as heretofore, from which an acknowledgment of the residue of the debt may be implied. It does not, however, even in that case, constitute an express promise, nor amount *per se* to a renewal;

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but it is evidence from which an intention to renew the original promise may be inferred (Shoemaker v. Benedict, 1 Kernan, 185). So, in the case of a demand existing at the death of the intestate, and which the administrator is bound to pay, it would be legitimate to infer from a subsequent partial payment, an acknowledgment of his continuing the obligation.

But in respect to demands barred at the death of the intestate, the administrator is under no such obligation. The immunity of the estate is absolute. His position is purely fiduciary. It is his right and his duty to apply the bonds in his hands to the satisfaction of all legal demands; but he has no retrospective authority to contract debts in the name of the intestate, or to revive those which were extinguished by law in his lifetime. There is a moral obligation on the debtor to pay demands which he knows have never been satisfied; but there is none on his executor or administrator to pay claims which the statute has barred. He is not at liberty to misapply assets which the law awards to the creditors and next of kin.

It has been questioned by eminent jurists, in this country as well as in England, whether a demand barred by the statute can be revived, even by an expressed promise of the personal representatives, unless with the consent of those interested in the estate; and it is well settled that without an express promise, there can be no revival by an executor or administrator of a debt extinguished in the lifetime of the decedent. This is the only mode in which he can give the status of a legal creditors in the courts to the holder of an outlawed demand against the estate; if, indeed, it can be given in that mode, within the principles settled by the more recent decisions. There was such express promise in this case, and the Defendant was therefore entitled to judgment ,Tullock v. Dunn, R. & M. 416; Thompson v. Peter, 12 Wheaton, 565; Bloodgood v. Bruen, 4 Selden, 362, 369). In the case last cited, Judge Gardiner, in delivering the opinion of the court, said: "But if we assume with the court below, that Bruen, as executor of the estate of T. H. Smith, admitted this demand, an admission in that character cannot, it seems to me, in the nature of the case, amount to a

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contract which will bind the estate of the testator. It is no part of the duty of an executor to subject the estate of his testator to a demand from which it was by law exempt. If he can do in any manner, it must at all events be by a positive contract. It has accordingly been held, even in England, that there must be an express promise, and that all the executors must unite in it."

The doctrine which at one time prevailed, that an outlawed demand might be revived by a partial payment, not made by the immediate debtor but by a joint contractor, an assignee or a trustee, it no longer recognized in our courts (Roosevelt *v.* Mark, 6 John. Ch. 267, 292; Pickett *v.* King, 34 Barbour, 193; Bloodgood *v.* Bruen, 4 Selden, 362; Shoemaker *v.* Benedict, 1 Kernan, 176, 185; Winchell *v.* Hicks, 18 New York, 558; Pickett *v.* Leonard, 34 ib. 175).

It follows from these views that the endorsement in the handwriting of the Defendant should be treated as the mere statement of the fact of payment, by one who had no authority in this form to bind the estate; and that, even if it had been authenticated by his signature in his representative capacity, it would have proved nothing but the making of such payment, and would have amounted neither to a renewal of the note, nor an express promise to pay the residue of a claim which did not constitute a legal debt of the intestate.

The judgment of the Supreme Court should be affirmed.

All the judges concurred in the foregoing opinion except Grover, J., who read an opinion for reversal, in which Hunt, J., concurred. Judgment affirmed.

JOEL TIFFANY,
State Reporter.

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ALEXANDER M. LAWRENCE v. RALPH CLARK AND OTHERS.

Note without consideration on Debt.

The receiving of a note on a precedent debt without surrounding or relinquishing any security or right in regard to it, does not constitute the party so receiving it a holder thereof for value.

THIS is an appeal from an order of the General Term, reversing a judgment of the Special Term in favor of the Defendants.

The notice of appeal was accompanied by a stipulation on the part of the Defendants, that in case the order appealed from should be affirmed, judgment absolute might be rendered against them.

The action was brought against the Defendants as makers of a promissory not for $569.33, dated September 1, 1854, payable four years from date. The Defendants, comprising the mercantile firm of Clark, Watson & Co., having become embarrassed in their business and unable to meet their engagements, entered into a composition agreement with the creditors, by which the latter agreed to accept seventy-five per cent. of their claims, secured by notes of the firm with an endorser, payable at stated periods, in full settlement and satisfaction thereof.

Bills and notes—Equities—Precedent debt. 49 *N. Y.* 295; 65 *N. Y.* 441; 81 *N. Y.* 221; 104 *N. Y.* 122 (5 *St. Rep.* 531; 25 *Week. Dig.* 488); 3 *Hun,* 150 (5 *T. & C.* 287); 3 *Hun,* 714; 6 *Hun,* 202; 23 *Hun,* 324; 28 *Hun,* 79; 58 *Hun,* 207 (37 *St. Rep.* 432; 12 *N. Y. Supp.* 334); 69 *App. Div.* 175 (74 *N. Y. Supp.* 606); 20 *Misc.* 26 (44 *N. Y. Supp.* 783); 43 *How. Pr.* 425; 48 *How. Pr.* 354; 59 *How. Pr.* 295; 12 *Abb. N. S.* 495; 6 *T. & C.* 149; 4 *Lans.* 72; 7 *Lans.* 3; 34 *Super. Ct.* 388; 36 *Super.* 370; 5 *Daly,* 215; 11 *St. Rep.* 533; 34 *St. Rep.* 64 (11 *N. Y. Supp.* 638); 37 *St. Rep.* 680 (13 *N. Y. Supp.* 567).

Composition agreements—Secret reservations. 45 *N. Y.* 332; 14 *Hun,* 40; 29 *Hun,* 405; 47 *Hun,* 216 (13 *St. Rep.* 349); 19 *Abb. N. C.* 219; 1 *How. N. S.* 303.

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The arrangement with the creditors was general; and a paper in due form was executed by them, evidencing the agreement. The firm of Wood & Grant were creditors of Clark, Watson & Co., and accepted the conditions, and with the other creditors signed the paper. Notes duly endorsed for seventy-five per cent. of the indebtedness to Wood & Grant were furnished according to the arrangement, which were accepted by that firm and paid as they fell due. At the time of the arrangement and as an inducement to Wood & Grant to enter into it, it was secretly agreed that Clark, Watson & Co. should, in addition to the compromise notes, also give that firm their firm-note for the excess of twenty-five per cent.; and pursuant to such agreement, and for such excess, the note in suit was given.

A few months before it fell due Wood & Grant transferred the note to the Plaintiff, who received and accepted it upon and in part payment of a prior existing indebtedness of that firm to him.

BOCKES, J.—It must be conceded that the note in suit was invalid in the hands of Wood & Grant, who received it for the balance of their claim beyond the amount secured to all the creditors of Clark, Watson & Co., by the composition deed. The secret agreement made with Wood & Grant was illegal, and the note given in pursuance of it was void in their hands (Breck *v.* Cole, 4 Sandf. 79; Russell *v.* Rogers, 10 Wend. 473, 479; 4 E. D. Smith, 466; Hall *v.* Dyson, 10 Eng. L. & E. 424; Leicester *v.* Rose, 4 East. 372; 12 Price's Exch. Rep. 183; 13 Vesey, 581; 15 Vesey, 52; 9 N. H. Rep. 478).

Nor can the Plaintiff enforce it if not a bonâ fide holder. According to the evidence, he received it from Wood & Grant and applied it on a preexisting debt which he held against that firm. Mr. Clark, one of the firm, testified: "He (Plaintiff) had demands against us of about $5,000; the money was due at the time; he took this note for a debt; he gave us credit for the note; he has no claim against us on account of the note; he took it in payment of so much of his debt." The question now is, was he a bonâ fide holder of the paper? A bonâ fide holder

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of negotiable paper is one who receives it before maturity, for value, and without notice of any existing equity against it. In this case the Plaintiff received it before maturity, and without notice. But did he give value for it; did he part with anything of value or relinquish any right upon the faith of it?

It was held in the leading case in this State, of Coddington v. Bay (5 John. Ch. 54; 20 John. 637), that the holder, to be protected against latent equities, must have parted with something of value at the time the note was received in money or property, or must have incurred some responsibility or relinquished some right on the faith of it. The numerous decisions bearing on this question were all carefully considered in Farrington v. The Frankfort Bank (24 Barb. 554); and it was there determined that the rule laid down in Rosa v. Brotherson (10 Wend. 86), and in Payne v. Cutler (13 Wend. 605), to the effect that when a creditor receives the transfer of a negotiable note in payment of a precedent debt, without giving up any security, takes it subject to all equities existing within the original parties, was the settled law of this State.

I am not aware of any more recent case holding in hostility to this rule. In Brown v. Leavitt (31 N. Y. 113), a security was surrendered on receiving the new note. In Boyd v. Cummings (17 N. Y. 101) a right was relinquished. In Ayrault v. McQueen (32 Barb. 305) security was surrendered. In Stettheimer v. Meyer (33 Barb. 215), a note was surrendered and money paid.

In Cardwell v. Hicks (37 Barb. 458) the note was taken for a precedent debt and for cash paid. It was held that the party could receive only for the amount of cash advanced.

In Chesbrough v. Wright (41 Barb. 28), it was held that the receiving a note in part payment of a precedent debt did not constitute a parting with value, which would render the holder a bonâ fide holder for value. In Webster v. Van Steenburgh (46 Barb. 212) it was held that to constitute a person a bonâ fide purchaser, he must have received the instrument upon some new consideration advanced at the time, or must have relinquished some security for a preexisting debt due him (32 N.

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Y. 553, 557; 34 N. Y. 247). It seems, therefore, perfectly well settled that the receiving a note on a precedent debt, without surrendering or relinquishing any security or right in regard to it, will not constitute a person a bonâ fide holder, so as to shut out equities which might be insisted on against the prior owner. In this case the Plaintiff received the note to apply, so far as it would go, in reduction of the indebtedness of Wood & Grant to him. He relinquished no security or right on the faith of it; nor did he part with anything or incur any risk in obtaining it.

As regards the indebtedness of Wood & Grant to him, his position was the same after as before he accepted the note. So far as appears from the evidence, his right to prosecute that firm for his claim was not at all impaired. The imposition upon him of an illegal, hence valueless, note, deprived him of no right which he otherwise would have had.

The judge, therefore, ruled correctly on the trial, in holding that the Plaintiff was not a bonâ fide holder of the note for value, but occupied the position of Wood & Grant in regard to the defence urged.

The order of the General Term should be reversed, and judgment absolute rendered for the Defendants, pursuant to the stipulation.

The same result will be attained by reversing the order appealed from, and affirming the judgment of the Special Term.

WRIGHT, PORTER, HUNT, PARKER, and SCRUGHAM concurred in the above opinion.

DAVIES and GROVER dissented.

JOEL TIFFANY,
State Reporter.

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JEROME PHILLIPS, RESPONDENT, v. ISAAC TERRY, APPELLANT.

Evidence— Expert—Quantity of Grass.

When material, it is competent to inquire of a witness his opinion as to the quantity of grass growing upon an acre of land, he being acquainted with the land and the grass thereon, and being familiar with the subject of estimating the quantity of grass growing upon land.

The facts upon which such an opinion must be based can be communicated in no other way to the minds of the jury; it is the best evidence which is capable of being given upon such subject.

PARKER, J.—In regard to the only conclusion of law found by the referees before whom this action was tried, to wit, that the Plaintiff recover of the Defendant the sum of fifty dollars and costs, there can be no doubt that it is sustained by the facts found; for the referees found that the creek described in the complaint was obstructed by the Defendant in such manner as to cause the water to set back upon the land of the Plaintiff to his damage; and that, although after the creek was so obstructed, the controversy between the parties in relation thereto was submitted to arbitration, and the award of the arbitrator made, which settled all damages arising from said obstructions before said award; yet that after the award, by reason of said obstructions, the waters were again caused to set back upon the meadow land of the Plaintiff, and upon his growing grass, by which the same was damaged to the amount of fifty dollars.

In regard to the findings of fact, it is enough to say that the exceptions taken to them do not bring up to this Court the question whether they are sustained by the evidence or not (18 N. Y. R. 573; 14 N. Y. R. 310; 31 N. Y. R. 547).

The Defendant upon the trial took some exceptions to the admission of evidence which it is necessary to consider The witness Haines, who was a surveyor and civil engineer, had made

Evidence—Experts—Opinions. 118 *N. Y.* 433 (29 *St. Rep.* 790); 165 *N. Y.* 596.

Nuisance—Continuing—Right of action. 26 *Hun,* 122.

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a survey of the creek, and a map, and had taken levels at various points upon the land of the Plaintiff, which was then overflowed and liable to be overflowed at certain stages of the water, and had estimated the distances of these points from each other. His levels were from the surface of the water at a time when the creek was not at its height. He was asked by the Plaintiff's counsel, "On these estimated distances, and the levels you took, how much more land would be overflowed with water, if the water was one foot higher-" To this the counsel for the Defendant objected, "on the ground that the map does not show where the forest comes to," which objection was overruled, and the witness answered, "ten acres." The ground of the objection, so far as it is made to appear in the case, was no reason for excluding the evidence, which was entirely pertinent and material to the issues, the object being to show how much land would be overflowed at a given height of the water. Even if it had not already been shown that the water had ever reached the proposed height, evidence tending to show that fact was given afterward which would have cured the error if the objection had been placed upon that ground.

The Plaintiff himself being a witness, was asked by his counsel, "How long would the water usually be in going off, before the wall was built?" The counsel for the Defendant objected on the ground that "the witness must state the fact, and not give such evidence." The witness had stated that, since the wall complained of was built, the water had continued to stand on his land eight or ten days after the rain had ceased, and longer than it had done before. The question, then, was intended to show the comparative effect of the rain upon his land, as to time of continuance, before and after the building of the wall. It called for a fact which was relevant and material, and was entirely proper.

The Plaintiff testified, in regard to injury from the water upon his meadow, that in June, 1858, there was high water over about ten acres, when the grass was about a foot high, and had just begun to head out. He was asked by his counsel, "Taking that hay as it stood then, what would it yield to the

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acre?" This was objected to on the ground that it called for the opinion of the witness. I think it was competent to ascertain the fact sought by the inquiry through the opinion of a witness. A person conversant with the growth of grass, and accustomed to compare its appearance in different stages of such growth with its ultimate yield to the acre, may well be said to have such knowledge of that subject as to make him competent to testify how much, in his opinion, a given piece examined by him will yield per acre. The facts on which such an opinion is based, like those on which the value of a given article of property depends, are of such a character as not to be capable of being transferred to the mind of a jury so completely and intelligibly as to enable them to form an adequate determination for themselves (Clark *v.* Baird, 5 Seld. 183, and cases there cited).

The principle is the same as that on which the opinion of an expert is received. The farmer, acquainted with the subject-matter of such an inquiry as this under consideration, is an expert, and unless the witness has the peculiar knowledge which constitutes him an expert, his opinion would be excluded. Here it was assumed by the Plaintiff's counsel, and not denied by the Defendant, that the witness was competent, but the objection was that the fact could not be proved by opinion.

The same may be said in regard to the testimony of the witness Sabar, to wit: "There should have been one and one-half tons of hay to the acre."

But the testimony of both these witnesses related to damages which accrued prior to the arbitration and award, and the damages found by the referees accrued subsequent to the award. If, then, this evidence was erroneously admitted, no injury can have been produced to the Defendant by receiving it, and it furnishes no ground for reversing the judgment.

I am of the opinion that the judgment should be affirmed.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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ALEXANDER L. SHAW, APPELLANT, v. WILLIAM N. SMITH, RESPONDENT.

Appeal—Ground of Objections must be stated to Referee.

Where, upon a hearing before a referee, objections are taken to certain questions propounded to witnesses, without stating the ground of the objections, on an appeal such general objections cannot be made available upon review.

JANUARY 1, 1858, and for some years prior thereto, the parties carried on business in the city of New York as copartners in the willow and wooden-ware business. There was no agreement as to the time the partnership should continue. On the 7th of that month the Defendant gave notice of dissolution, and took exclusive possession of the assets of the firm. Thereupon the Plaintiff commenced this action for an account of the partnership, and to recover his interest therein. It was referred to a referee to take an account of the partnership property and of the interest of the respective parties. The account was taken, by which it was found that the entire assets of the firm were insufficient to pay its debts and the balance owing by the firm to the Defendant; and that the Plaintiff was indebted to the firm and should on account thereof pay to the Defendant the sum of six hundred and fifty dollars and twenty-seven cents; that the latter should pay the debts of the firm, and have to his own use the assets of the firm.

The Plaintiff took various exceptions to the report, raising various question of fact. The report was confirmed by the Special Term, and judgment rendered in accordance therewith, which was affirmed on appeal by the General Term, from which the Plaintiff appealed to this Court.

H. D. Lapaugh for Appellant.
A. Gibbs for Respondent.

Evidence—Ground of exception—Statement of. 85 *N. Y.* 417; 1 *T. & C.* 509; 2 *City Ct.* 213.

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GROVER, J.—In looking over the papers in this case I am unable to discover any question so presented as to enable this Court to notice it. This Court can in this class of cases only review questions of law raised in the Court below to the rulings, upon which proper exceptions were taken. The exceptions taken to report of the referee present questions of fact only. Upon the hearing before the referee certain questions were objected to by the Plaintiff's counsel, which objections were overruled by the referee, to which rulings the Plaintiff's counsel excepted, but no grounds for any of the objections was stated. Such general objections stating no ground therefor are not available upon review. In short, they amount to nothing, only to lumber up the case.

The judgment appealed from must be affirmed, and I should be in favor of giving damages to the Respondent, was I not impressed by a perusal of the case that the Appellant had had rather a hard measure applied to his case, probably resulting from a failure in calling attention to the point. The Respondent appears to have got all the bad debts for nothing, and I apprehend a larger judgment than a close examination of the accounts would entitle him to. But there being no exceptions on these points, this Court can afford no redress should it find the judgment incorrect in these particulars.

All concur. Affirmed.

JOEL TIFFANY,
State Reporter.

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EUNICE PARKER, APPELLANT, v. PORTER McCLUER, RESPONDENT.

Advancement discharges Estate of claim as Heir.

Where the intestate in his lifetime had given to his son real estate as an advancement, which in value was equal to what would have been his share in his father's estate, such advancement discharges the estate of the intestate for all claims of the son of his heirs, as heirs of the estate of the intestate.

A. G. Rice for Appellant.
S. S. Spring for Respondent.

DAVIES, CH.J.—This is an action of ejectment, in which the Plaintiff claims to recover one-sixty-fourth part of a certain farm, whereof Joseph McCluer died seized. He is one of eight children of Samuel McCluer, a son of Joseph McCluer.

The facts, as found by the Supreme Court, are as follows:

On the 19th day of July, 1828, Samuel McCluer, with his wife, executed and delivered to Joseph McCluer, his father, a quit-claim deed of the whole of lot No. 39, in township No. 4, in the Holland Land Company's survey, in Cattaraugus county, which included the premises described in the complaint, excepting and reserving therefrom several small parcels theretofore conveyed, and also forty-five acres on the north-east part of the lot. At the time of giving such deed it was verbally agreed between Samuel and Joseph his father, that Samuel should have the forty-five acres on the north-east part of the lot, in full for his share as heir of the estate of the said Joseph; but no writings were made between them, and Joseph gave Samuel no written evidence of title to said forty-five acres. Joseph McCluer was in possession of the forty-five acres prior to that agreement, and immediately thereafter the said forty-five acres were surveyed off to said Samuel, and he went into possession

Advancements—Oral gift of land. 6 *Misc.* 588 (57 *St. Rep.* 853; 27 *N. Y. Supp.* 629).

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of the same, and continued in possession thereof until his death in July, 1829.

At the time the deed was given, Joseph went into the possession of the land conveyed or quit-claimed by Samuel and his wife, and remained in possession until his death in 1833, and was seized in fee of the same at the time of his death. The premises described in the complaint form a part of the land conveyed to Joseph by Samuel, and form no part of the land excepted or reserved from said deed. Samuel died intestate in July, 1829, leaving him surviving eight children, of whom the plaintiff is one, all legitimate and heirs to his estate. Samuel was a legitimate son of Joseph; and had he been living when Joseph died, would have taken as an heir to Joseph. Joseph died in September, 1833, intestate, and leaving grandchildren, the children of said Samuel, including the Plaintiff. The Defendant was in possession of the land described in the complaint at the time of the commencement of the action, August 3, 1859, and claimed title to the same, to the exclusion of the Plaintiff. He had acquired all the title of all the heirs of Joseph McCluer, except the children of Samuel.

The Plaintiff was born August 18, 1828, and claims judgment for the possession already mentioned as heir-at-law of Joseph McCluer, deceased. About two years after the death of Samuel, his administrators, pursuant to an order of the surrogate of Cattaraugus county, sold the forty-five acres for the payment of the debts of the said Samuel. It appeared that the forty-five acres, at the time the deed was given in 1828, were worth more than one-eighth part of all the land owned by Joseph at that time. The jury, under the direction of the court, rendered a verdict for the Plaintiff for the undivided one-sixty-fourth part of the premises described in the complaint, subject to the opinion of the court at General Term, which decided that the transaction between Joseph and Samuel amounted in law to an advancement from Joseph to Samuel, or if not, that the agreement, part performance, and attending circumstances were such as in equity to require that the agreement should not be disturbed by the children and heirs-at-law of Samuel; or if

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not, that the legal title to the forty-five acres was in Samuel, and the equitable title in Joseph, and that the effect of the reservation and subsequent acts of the parties was a complete consummation of the agreement, and that the Plaintiff could not recover any portion of the land described in the complaint as heir-at-law of Joseph McCluer or otherwise; and gave judgment for the Defendant.

The Plaintiff now appeals to this Court. The provisions of the Revised Statutes applicable to advancements to children by their parents are as follows:

"§ 23. If any child of an intestate shall have been advanced by him, by settlement or portion of real or personal estate, or of both of them, the value thereof shall be reckoned, for the purposes of this section only, as part of the real and personal estate of such intestate, descendible to his heirs, and to be distributed to his next of kin according to law; and if such advancement be equal or superior to the amount of the share which such child would be entitled to receive of the real and personal estate of the deceased, as above reckoned, then such child and his descendants shall be excluded from any share in the real and personal estate of the intestate.

"§ 24. But if such advancement be not equal to such share, such child and his descendants shall be entitled to receive so much only of the personal estate and to inherit so much only of the real estate of the intestate as shall be sufficient to make all the shares of the children in such real and personal estate and advancement to be equal, as near as can be ascertained.

"§ 25. The value of any real or personal estate so advanced shall be deemed to be that, if any, which was acknowledged by the child by an instrument in writing, otherwise such value shall be estimated according to the worth of the property when given."—(1 Rev. Stat., 1st ed., p. 754.)

There was no acknowledgment in writing of the value of the real estate advanced to Samuel, and it was therefore proper to estimate the worth at the time the property was given. This time was the date of the deed or release from Samuel to his father in 1828, when forty-five acres were given to him, and a

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survey thereof made, and possession of the same given by Joseph to Samuel.

Samuel continued in possession thereof up to the time of his death, and it was subsequently sold for the payment of his debts.

Upon the facts found by the court, Joseph and his heirs would undoubtedly be estopped from setting up any claim to the fiorty-five acres; and if any such claim had been preferred, a Court of Equity would have restrained its enforcement.

It does not appear, from the finding of facts, that Joseph acquired any other real estate, prior to his death, than that which he owned at the time of the transaction with his son Samuel, on the 19th day of July, 1828. Neither does it appear that he died possessed of any personal estate. We are authorized to assume, to sustain this judgment, that he acquired no other real estate, after the 19th July, 1828, and that he did not die possessed of any personal estate. If the Plaintiff's right of recovery was dependent upon establishing either of these facts, she should have done so upon the trial.

It having been found as a fact that the forty-five acres given by Joseph to his son Samuel in July, 1828, were worth more than one-eighth part of all the land or real estate of Joseph, we agree with the Supreme Court, that the transaction between Joseph and Samuel amounted in law to an advancement from the former to the latter. Samuel, or his children, upon the death of Joseph, intestate, were entitled to take one-eighth part of his estate, real and personal. It not appearing that he left any personal estate or any real estate other than what he possessed on the 19th of July, 1828, it appears from the facts found, that Samuel was advanced more than one-eighth part of the estate which Joseph owned.

Such advancement being equal, if not superior, to the amount of the share which Samuel would be entitled to receive of the estate of Joseph, it follows from the provisions of the Revised Statutes above quoted, that Samuel and his children, including this Plaintiff, must be excluded from any further share in the estate of Joseph McCleur. This clearly should be so, until

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it is made to appear that he died possessed of any real or personal estate other than that owned by him on the 19th July, 1828.

This action is to recover one-sixty-fourth part of the real estate which this Plaintiff's ancestor quit-claimed and released to the ancestor of the Defendant, on consideration of receiving the forty-five acres, which were worth more than one-eighth part of all the real estate of the Defendant's ancestor. If Joseph then had died intestate before such advancement or gift to Samuel, such one-eighth part would have been all that Samuel would have inherited. He has received his equal share and retained the same, and his heirs now claim the one-eighth part of the residue. A more inequitable claim could hardly be preferred, and I concur with the Supreme Court that it cannot be maintained. Judgment should be affirmed with costs.

All concur. Affirmed.

JOEL TIFFANY,
State Reporter.

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HARVEY F. AUBREY, RESPONDENT, v. JOSIAH M. FISKE, APPELLANT.

Pleading—Conversion by Agent—Property of Principal.

Where an agent converts the property of his principal into money in pursuance of his ogency, and applies the money to his own use, in an action by the principal to recover the same, it is no defence for the agent to set up that the property converted was not, in equity, that of the principal; and if he sets up facts of that character in his answer, the Court, on motion, may strike out that portion of the answer as irrelevant.

APPEAL from the Supreme Court. The action was against the Defendant, a commission merchant in New York, for the proceeds of property received by him for sale from E. T. Aubrey & Co., the assignors of the Plaintiff.

The trial resulted in a judgment in favor of the Plaintiff for $2,980.07, which was affirmed at the General Term in the First Judicial District. The only question made on the appeal to this Court, is as to the correctness of an interlocutory order, striking out portions of the answer as irrelevant.

It was alleged in the complaint, that in 1862 the Defendant received from E. T. Aubrey & Co., the assignors of the Plaintiff, a quantity of wheat and bags, and sold the same for their account as a commission merchant; that he rendered to them an account of the sales, the net proceeds of which were $3,979.-50, of which $1,145.16 became due on the 6th of March, and the balance on the 25th of May; that he paid $1,200 of the amount; that the balance was assigned to the Plaintiff; that the Defendant refused to pay it; and that such balance remained due to the Plaintiff.

The answer, not denying the material facts, alleged, among other things, that the property was shipped in the name of Aubrey & Co. by mistake, and should have shipped in the name of Solomon Sturgis & Son; that of the property received

Receipt of property of third person—Action by owner—Equities. 118 *N. Y.* 448 (29 *St. Rep.* 965); 6 *Hun,* 233.

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by the Plaintiff as alleged in the complaint, a portion was furnished by Sturgis & Son, who made advances to Aubrey & Co., and by the arrangement between those parties, the shipment was to be made in the name of Sturgis & Son, the same to be sold on their account, and the title to remain in them until such sale; that by mistake the shipment was made in the name of Aubrey & Co.; that the proceeds of the sales were not more than sufficient to pay the advances made by the latter by Sturgis & Son, and the value of the wheat received from them; and that the Defendant did not learn these facts until after he had rendered his account of sales, but was notified of them before he paid over the proceeds.

These portions of the answer were struck out as irrelevant, by order of Judge Leonard, at Special Term, and the order was affirmed at the General Term.

E. More for Appellant.
Edgar Ketchum for Respondent.

PORTER, J.—The property was received from Aubrey & Co. by the Defendant, who converted it into money as their agent, and now proposes to detain the proceeds from his principal. The pretext for converting the money to his own use is, that it equitably belongs to Sturgis & Son, as between them and the parties from whom he received it. He sets up this claim of his own motion, after rendering an account of sales to his principals, and seeks to excuse his breach of duty by alleging outstanding equities in which he has no concern. He pays the money to neither party; does not offer to pay it into court; does not propose to interplead the supposed claimants; and complains that the Court will not permit him to detain the proceeds from his principal, while he litigates, as a volunteer, a supposed claim of third persons, who are not parties to the suit, and cannot be bound by the judgment.

The Supreme Court was right in striking out this portion of the answer as irrelevant. It constituted no defence to the action, and had no bearing on the measures of damages. (Bates

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v. Stanton, 1 Duer, 79; Story on Bailments, §§ 451, 582; Angell on Carriers, 3d ed., § 335; McKay *v.* Draper, 27 N. Y. 256; City Bank of New Haven *v.* Perkins, 29 N. Y. 554; Laverty *v.* Moore, 33 N. Y. 658.)

The judgment should be affirmed. Judge Scrugham read an opinion to the same effect.

All the judges concurring, judgment affirmed.

JOEL TIFFANY,
State Reporter.

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POHN B. TREVOR, JR., AND JAMES B. COLGATE, APPELLANTS, *v.* JOHN WOOD, GEORGE W. WOOD, AND JAMES CULLEN, RESPONDENTS.

Contract—Time of Consummation—Letter or Telegram.

Where there is a proposition on the one part, and an acceptance on the other, manifested by distinct overt acts, as the sending of a letter, or a telegram, the contract is consummated from the time such acceptance was thus signified.

APPEAL from a judgment of the Supreme Court, rendered at General Term, in the First District, reversing a judgment entered upon the report of Hon. William Mitchell, referee, and ordering a new trial before the same referee.

The Appellants have stipulated that if the judgment be affirmed, judgment absolute may be entered against them.

The Appellants are dealers in bullion in New York, and the Respondents are dealers in bullion in New Orleans. In 1859 they agreed to deal with each other in the purchase and sale of dollars, and that all communications between them in reference to such transactions should be by telegraph.

On 30th January, 1860, the Appellants telegraphed from New York, to the Respondents, at New Orleans, asking at what price they would sell one hundred thousand Mexican dollars. On 31st of the same month the Respondents answered that they would deliver fifty thousand at seven and one-fourth, and on the same day the Appellants telegraphed from New York, to the Defendants at New Orleans, as follows:

"To JOHN WOOD & Co.: Your offer fifty thousand Mexicans at seven and one-quarter accepted; send more, if you can.

"TREVOR & COLGATE."

Contracts—Consummation—Mailing. 50 *N. Y.* 250; 61 *N. Y.* 366; 127 *N. Y.* 618 (40 *St. Rep.* 426); 149 *N. Y.* 391; 34 *Hun,* 78; 25 *App. Div.* 233 (49 *N. Y. Supp.* 340); 21 *Misc.* 14 (46 *N. Y. Supp.* 853); 6 *Abb. N. C.* 90; 3 *Lans.* 402; 9 *St. Rep.* 33.

Contracts—Locus 150 *N. Y.* 549.

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At the same time the Appellants sent by mail to the Respondents, a letter acknowledging the receipt of the Respondents' telegram, and copying the Appellants' telegraphic answer. On the same day the Respondents had also sent by mail a letter to the Appellants, copying Respondents' telegram of that date. On the next day (1st February, 1860), the Appellants again telegraphed to the Respondents as follows:

"To JOHN WOOD & Co.: Accepted by telegraph yesterday your offer for fifty thousand Mexicans; send as many more, same price. Reply.

"TREVOR & COLGATE."

This telegram, as well as that of 31st of January, from the Appellants, did not reach the Respondents until 10 A. M., on 4th February, 1860, in consequence of some derangement in a part of the line used by the Appellants, but which was not known to the Appellants until 4th February, when the telegraph company reported the line down. On 3d February the Respondents telegraphed to the Appellants as follows: "No answer to our despatch—dollars are sold;" and on the same day they wrote by mail to the same effect. The Appellants received this despatch on the same day, and answered it on the same day, as follows: "To John Wood & Co.: Your offer was accepted on receipt;" and again the next day, "The dollars must come, or we will hold you responsible. Reply. Trevor & Colgate;" and again on 4th February, insisting on the dollars being sent "by this or next steamer," and saying, "Don't fail to send the dollars at any price." On the same 4th February, the Respondents telegraphed to Appellants, "No dollars to be had. We may ship by steamer, twelfth, as you proposed, if we have them." No dollars were sent, and this action was brought to recover damages for an alleged breach of contract in not delivering them.

The referee found for Plaintiff $219.33.

SCRUGHAM, J.—The offer of the Respondents was made on

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the 31st January, and they did not attempt to revoke it until the 3d of February. The offer was accepted by the Appellants before, but the Respondents did not obtain knowledge of the acceptance until after this attempted revocation. The principal question, therefore, which arises in the case is whether a contract was created by this acceptance, before knowledge of it reached the Respondents.

The case of Mactier *v.* Frith, in the late Court of Errors (6 Wend. 103), settles this precise question, and was so regarded by this Court in Vassar *v.* Camp (1 Kernan, 441), where it is said that the principle established in the case of Mactier *v.* Firth was, "that it was only necessary that there should be a concurrence of the minds of the parties upon a distinct proposition, manifested by an overt act; that the sending of a letter announcing a consent to the proposal was a sufficient manifestation, and consummated the contract from the time it was sent."

There is nothing in either the case of Mactier *v.* Firth or in that of Vassar *v.* Camp, indicating that this effect is given to the sending of a letter, because it is sent by mail through the public post-office; and, in fact, the letter referred to in the first case could not have been so sent, for it was to go from the city of New York to Jacmel, in the island of St. Domingo, between which places othere was at that time no communication by mail.

The sending of a letter accepting the proposition is regarded as an acceptance, because it is an overt act, clearly manifesting the intention of the party sending it to close with the offer of him to whom it is sent, and thus making that "aggregatio mentium" which is necessary to constitute a contract.

Mr. Justice Marcy, in delivering the leading opinion in Mactier *v.* Firth says: "What shall constitute an acceptance will depend, in great measure, upon circumstances. The mere determination of the mind, unacted on, can never be an acceptance. Where the offer is by letter, the usual mode of acceptance is the sending of a letter announcing a consent to accept; where it is made by a messenger, a determination to accept, returned through him, or sent by another, would seem to be all the law requires, if the contract may be consummated without writing.

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There are other motives which are equally conclusive upon the parties; keeping silence, under certain circumstances, is an assent to a proposition; anything that shall amount to a manifestation of a formed determination to accept, communicated, or put in the proper way to be communicated to the party making the offer, would doubtless complete the contract."

It was agreed between these parties that their business should be transacted through the medium of the telegraph. The object of this agreement was to substitute the telegraph for other methods of communication, and to give to their transactions by it the same force and validity they would derive if they had been performed through other agencies.

In accordance with this agreement, the offer was made by telegraph to the Appellants in New York; and the acceptance, addressed to the Respondents in New Orleans, was immediately despatched from New York, by order of the Appellants.

It cannot, therefore, be said that the Appellants did not put their acceptance in a proper way to be communicated to the Respondents, for they adopted the method of communication which had been used in the transaction by the Respondents, and which had been selected by prior agreement between them, as that by means of which their business should be transacted.

Under these circumstances the sending of the despatch must be regarded as an acceptance of the Respondents' offer, and thereupon the contract became complete.

I cannot conceive upon what principle an agreement to communicate by telegraph can be held to be in effect a warranty by each party that his communication to the other shall be received. On the contrary, by agreeing beforehand to adopt that means of communication, the parties mutually assume its hazards, which are principally as to the prompt receipt of the despatches.

The referee finds as a fact that the Respondents answered the telegram of the Appellants, asking at what price they would sell 100,000 Mexican dollars, by another telegram, as follows, viz.:

"TREVOR & COLGATE, New York: Will deliver fifty thou-

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sand at seven and one-quarter, per Moses Taylor. Answer.

"JOHN WOOD & Co."

It was proved on the trial that this telegram was sent by the Respondents, and a letter of the same date, signed by them, repeating the telegram and stating that they had sent it, was read in evidence.

This affords sufficient evidence of subscription by the Respondents to take the case out of the statute of frauds.

The judgment should be reversed.

All the judges concurring except BOCKES & GROVER, JJ., who concurred only in the result.

Judgment reversed.

JOEL TIFFANY,
State Reporter.

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DARIUS PERRIN *v.* THE NEW YORK CENTRAL R. R. COMPANY.

Lots sold by Map are bounded by Centre of Street.

Where lots are sold by number designated on a map of the plat, and by such map such lots abut on a strip of land described on such map as a "street," or "park," the purchaser of such lots is to be deemed as being bounded by the centre of said strip or "street."

BOCKES, J.—The entire and exclusive appropriation by the Defendant of the premises in controversy, laid down on the map and there denominated "Park," was sufficient as a disseizin to entitle the Plaintiff to recover in this action (16 N. Y. 97; 24 N. Y. 655; ibid. 658; 25 N. Y. 526). The question here is whether the Plaintiff, in conveying the nine lots which abutted on the strip called "Park," by numbers, referring to the map, passed the fee in this strip to the grantees, in the same manner and to the same extent as if the strip of land had been dedicated by him as a street for the use of the adjoining lots. Had the strip been designated "Street" on the Plaintiff's map, instead of "Park," the case would be precisely that of Bissell *v.* The New York Central R. R. Co. (23 N. Y. 61), where it was held that as between grantor and grantee, the conveyance of a lot

Deeds—Boundary—Highway. 61 *N. Y.* 71; 90 *N. Y.* 162; 118 *N. Y.* 219 (28 *St. Rep.* 821); 37 *Hun,* 347; 8 *App. Div.* 106 (40 *N. Y. Supp.* 407); 77 *App. Div.* 489 (78 *N. Y. Supp.* 940; 12 *Ann. Cas.* 203); 42 *Misc.* 364 (86 *N. Y. Supp.* 763); 38 *How. Pr.* 76; 37 *Super. Ct.* 200; 18 *St. Rep.* 907 (2 *N. Y. Supp.* 563); 39 *St. Rep.* 935 (15 *N. Y. Supp.* 374).

Easement—Right of way—Rights of abutting owner. 68 *N. Y.* 13; 137 *N. Y.* 322 (50 *St. Rep.* 719).

Highways—Rights of abutters—Change of grade. 138 *N. Y.* 170 (51 *St. Rep.* 842); 43 *St. Rep.* 905.

Deeds—Reference to map—Fee of street. 62 *N. Y.* 649; 8 *Hun,* 477; 24 *Hun,* 148; 73 *App. Div.* 389 (77 *N. Y. Supp.* 27); 55 *Barb.* 414.

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bounded upon a street in a city, carries the land to the centre of the street. This, too, was like the present case, where the strip sought to be recovered was open upon a public street at one end only, and the conveyances of the adjoining lots were by numbers referring to the map, without any mention of a particular reference to the street by name.

In the case cited, this Court held that Mumford (under whom Bissell claimed title), by his conveyance of the lots abutting on the strip designated "Street" on the maps, passed the fee therein to his grantees; consequently, that Bissell could not recover against the Defendant, who had become sole owner of all the adjoining lots.

As has been already suggested, the only difference between the case cited and the one under consideration is, that in the former the strip of land sought to be recovered was designated "Street" on the map, and in the latter it was designated "Park." In fact, is there any difference which should require a different judgment in the two cases? Bissell's case was made to depend on the intention of the grantor, to be determined from the conveyances themselves, considered in connection with the map, which, by reference, was made part of them, the location of the lots, and the use for which the strip of land in controversy was obviously set apart and dedicated.

So it was reasoned that it was intended as a street because so designated on the map, and was intended as a means of access from the public highway to the lots abutting on it, which had no other common approach, public or private, and that it materially enchanced their value. It was therefore decided that such strip was intended as a street for their exclusive use and enjoyment, so far as the grantees of the adjoining lots were concerned, and that, when the title to all the lots centred in one person, he was entitled to its exclusive possession against any claim the grantor could urge by way of action in ejectment. Let us now apply the reasoning adopted in that case, and which it seems was satisfactory to every member of the court who took part in its decision, to the one in hand.

The Plaintiff, with a view to place his lands advantageously

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and profitably in market, caused them to be mapped, laid off in lots, and the lots to be numbered. He left on the map a narrow strip, forty-three feet in width, opening at one end into the public street, and extending into the plat one hundred and ninety feet. On this he located nine lots, seven of which had no other access to the public street. Without the advantages afforded by such passageway, those seven lots would be comparatively valueless.

There was no indication on the map, on the ground, or in the deeds of the adjoining lots afterward executed, of an intention to leave this strip of land open and vacant for ornament. On the contrary, the inference must be directly the reverse, for its form and location rendered is inappropriate for that purpose; while it was needed and became useful and valuable as a means of access to the lots in rear of those fronting on public streets.

It is beyond controversy that this strip of land was to be left open and vacant for the use of the owners and occupants of the adjoining lots, for all the purposes of a street, and there is nothing to indicate that the Plaintiff entertained any other or different purpose. Then, to adopt the language of Mr. Justice Mason in Bissell's case, "as between these parties, grantors and grantees, it is a public street to all intents and purposes, except that the public authorities are not bound to keep it in repair. It is made such by the Plaintiff himself, in laying out the street and putting it upon his map, and selling these lots upon either side of it with reference to the map and street, and he has probably received the full value of the street, in the increased price of the lots sold upon it." It is urged that the designation of "Park" on the map was of controlling significance, against the intent that the dedication was for a street. The Supreme Court adopted this view. The learned judge at the circuit found and decided "that when the Plaintiff laid out and platted his tract, which included the premises in question, he intended the space of land in question to be what he has designated it on the map —a Park—and not a mere passageway, leading by and to the adjoining lots." This finding is based on the fact that he des-

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ignated the strip of land "Park" on the map. What it was called I think is of very little importance, when its use and principal purpose is obvious beyond possible conjecture.

It cannot be denied that it was to be used as a passageway or street. This became a necessity from the location of the lots abutting upon it. This necessity rendered it inappropriate as a park; nor does it assume the strict definition of *park,* as platted on the map. A park is in the strict sense a piece of ground enclosed for purposes of pleasure, exercise, amusement, or ornament.

This strip of land was unenclosed, open to the common, and was intended so to remain. Nor was it set apart either for pleasure-ground, or for purposes of exercise, ornament, or decoration.

Its shape and situation was unsuitable for either purpose. It was opened *for use,* and *use alone,* and that was a passageway or street.

This was its primary and chief design, and, so far as the case shows, its only design. Although called a park, as we have seen, it was not a park, and its intended use as a street was as much beyond question as was the use of Erie stret, in Bissell's case. The decision in that case must therefore control the judgment in this.

The judgment of the General Term and of the Special Term should be reversed, and a new trial ordered, with costs to abide the event.

All concur except HUNT and SCRUGHAM, JJ., who dissent.

Reversed.

JOEL TIFFANY,
State Reporter.

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MOSES CHAMBERLAIN, APPELLANT, v. JANE R. DEMPSEY, RESPONDENT.

Usury a Personal Defence.

Usury is a personal defence, and can be made available only by the borrower, not by third parties.

And none but a party to a usurious contract, or his heirs, devisees, or personal representatives, can avoid a usurious contract on account of usury.

Brewster & Lake for Appellant.

George R. Thompson for Respondent.

DAVIES, CH.J.—This is an action to foreclose a mortgage, made and executed by the Defendants therein, William D. Salisbury and Samuel J. D. Arrowsmith, to the Plaintiff, to secure the payment of two certain promissory notes, made by said Salisbury and Arrowsmith to the order of one John Dempsey, and endorsed by him, and held and owned by the Plaintiff. The Court which tried the action without a jury found as facts, that the condition of the mortgage was, that if said notes should be paid, then said mortgage was to become void, but if not, then the Plaintiff was empowered to sell the mortgaged premises in due form of law; and further, that said notes were not paid at maturity. The Court also found that during the progress of the action, the Plaintiff entered into a stipulation with the Defendants, Salisbury and Arrowsmith, of the tenor hereinafter mentioned, in consideration of the withdrawal by them of the answer interposed by them to this action.

The Court thereupon found as conclusions of law, 1. That the Plaintiff is entitled to judgment of foreclosure and sale of such mortgaged premises, for the purpose of discharging the amount of principal and interest due upon such mortgage, together with the costs of the suit.

2. That the Plaintiff is not entitled to a judgment for any

Contract—Usury—Defense. 1 *Sheld.* 444.

Reference—Decree—Settling. 6 *Abb. N. C.* 366; 7 *Rob.* 36.

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deficiency which may appear upon the sale of the mortgaged premises.

And the Court ordered a reference to a referee, to ascertain and report the amount of principal and interest due to the Plaintiff upon such mortgage, and also to ascertain and report the amount due upon the mortgage described in the answer of the Defendant, George W. Platt, and also to ascertain and report whether there were any prior liens by mortgage upon said premises, and whether said prior mortgages were due.

The referee to whom the matter was referred, reported that the first lien upon two of the four lots of land covered by the Plaintiff's mortgage, was by way of a mortgage thereon executed by John Dempsey and his wife, and that a judgment of foreclosure thereon and a sale thereof had been obtained in the Supreme Court on the 27th day of November, 1861, and that the amount due them was adjudged to be $3,554.84.

That the first lien by mortgage upon the other two lots, was a mortgage thereon executed by said John Dempsey, upon which there was due of principal the sum of $3,100, and interest from March 15, 1861.

That the next lien by way of mortgage in priority, and which covered all said four lots of ground embraced in the Plaintiff's mortgage, was a mortgage held by the Defendant, George W. Platt, and upon which there was due at the date of said referee's report (April 22, 1862) the sum of $3,171.17.

That the mortgage to the Plaintiff covered the said four lots of land, and that there was due thereon at the date of said report the sum of $4,854.50.

Upon the coming in of said report, a judgment of foreclosure and sale was made at Special Term of the Superior Court of New York, held on the 3d day of May, 1862, which recited the making of said order of reference, the substance of the report of said referee, and that said report had been duly confirmed, whereby said Court ordered, adjudged, and decreed that said mortgaged premises set forth in the complaint, or so much thereof as might be sufficient to pay the amount due to the Plaintiff for principal, interest, and costs, to be sold at public

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auction, subject nevertheless to the three prior mortgages hereinbefore mentioned, and therein particularly referred to, by or under the direction of a referee appointed by the Court. The decree contained the usual directions for advertisement and sale, and directed the referee, out of the proceeds of sale, to pay—

1. The fees and expenses of the sale;

2. Any liens on the premises for taxes and assessments;

3. The costs and expenses of the Plaintiff's attorney, amounting to $323.19.

4. The costs of the attorney of Platt, the holder of one of the prior mortgages, $40.12;

5. The costs of the attorney of Delaplaine, also the holder of one of the prior mortgages, amounting to $40.12; said sums amounting to the sum of $403.43, or so much of the said sums as the purchase money would pay; and said referee was directed to bring the surplus moneys, if any, into the Court, and deposit the same with the Chamberlain of the City of New York, to the credit of the Clerk of said Court. From this judgment the Defendant, Jane R. Dempsey, appealed to the General Term of the Supreme Court, and on said appeal the General Term reversed said judgment, with costs to said Appellant, and said Court gave final judgment against said Plaintiff, in favor of said Defendant, Jane R. Dempsey. From this latter judgment the Plaintiff appeals to this Court.

I can see no ground for a reversal of this judgment, growing out of the manner in which it was rendered, and the proceedings on the trial thereof (Swarthout *v.* Curtis, 4 Coms. 415). The judge who first tried the action, settled and adjusted all the rights of the parties therein. If he committed no error in such disposition, it seems to me the judgment of foreclosure and sale finally entered should stand. Assuming for the present that no error was committed on the trial, then it was clearly competent for the Court, after the determination that the mortgage was a valid and subsisting security, to ascertain, and it was its duty to ascertain, the amount due thereon to the Plaintiff. The Court could not properly proceed to render final judgment of foreclosure and sale until such amount was ascertained. The Court

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had full power to order a reference for such purpose, and also to direct the referee to ascertain the amount of the prior incumbrances.

It was proper that all parties should have had notice of such reference and of the proceedings thereon. It appears from the papers that each of the parties had notice of the completion and filing of the report of the referee, and if any of them had any objection to the conclusions contained in the report, it was their duty to have filed and served exceptions thereto; or if any irregularity had been committed on such reference, of which they complained, it was equally their duty to have given notice of a motion to set aside the same. The Defendant's silence must be taken and deemed an acquiscence in the conclusions of the referee, and of the regularity of the proceedings before him. What further remained to be done? The Plaintiff had obtained an adjudication of the Court upon the rights of all the parties and upon the validity of his mortgage, the amount due to him upon his security, and the amount and order of the prior liens. To give efficacy to the Plaintiff's rights as thus established, it only remained to render the usual judgment of foreclosure and sale. This was done at the Special Term of the Court held on the third day of May, 1862, by the entry of the usual and, in all respects, proper judgment. There is no force in the objection that this judgment was not valid, because the Court was not held at that time by the same judge who rendered the preliminary judgment, ascertaining and settling the rights of the parties and ordering the reference. That interlocutory judgment was but in aid of the final judgment entered, and the Court pursued the correct practice in adopting and founding the final judgment upon the previous determination of the rights of the parties; and no one was prejudiced by this, as the appeal from the final judgment brought up for review the previous interlocutory orders or judgments, and in a case like this they could not be reviewed until final judgment was rendered. Neither is the final judgment objectionable, in that it made provisions for the payment, in the first place, out of the proceeds of the sale, of the mortgaged premises, and of the costs and expenses of the Plaintiff's attorney. Nor can this Appellant complain that the

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costs of the attorneys of the two prior mortgages were to be paid out of such proceeds, prior to any payment to this Plaintiff, on account of the amount adjudged due to him.

As already observed, if there was any irregularity in obtaining the final judgment, it should have been availed of by motion. An order, if made on such motion, could probably be reviewable as an intermediate order, on the appeal from the judgment. We cannot now review these irregularities, if any, for the obivious reason that the parties have not been heard thereon in the Court below, and we have not consequently either the facts before us, or the determination of that tribunal upon them.

We do not concur with the opinion of the Court, that it was not competent for the Court at Special Term, upon the final hearing, to award such costs as it in its discretion thought proper. The subject of costs was not disposed of when the case was first before the Court, and when the rights of the parties were settled, and the interlocutory order or judgment made. It was, therefore, not only competent, but eminently proper, that in the final judgment the question of costs should be disposed of; and it was no objection to such disposition, that the Court was held by a different justice than by the one who made the interlocutory decree or order. The only remaining point to be considered is whether the Defendant, Jane R. Dempsey, was in a condition to set up the usury, if any, in the mortgage. According to the allegations of the answer, the Defendant, Jane R. Dempsey, was the owner of the fee of the premises covered by the Plaintiff's mortgage, and such ownership was acquired subsequent thereto. She sought to prove that the Plaintiff's mortgage was given to secure a usurious loan made to the Defendants, Arrowsmith and Salisbury. If any such defence existed to the mortgage, the Defendant, Dempsey, could not avail herself of it. Usury is a personal defence, and can only be availed of by the borrower. The law in this State is clearly settled on this point.

In Bullard v. Raynor (30 N. Y. 197), Judge Wright said, all the other judges concurring: "There is another conclusive ground against the Plaintiff. No one but a party to a usurious

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loan, or his heirs, devisees, or personal representatives, can avoid a usurious contract on account of usury (Post *v.* The Bank of Utica, 7 Hill, 391; Rexford v. Widger, 2 Coms. 131). Usury cannot be set up by a stranger to the original transaction. A purchaser from the borrower is not included in the term borrower, and cannot avoid a note or mortgage for usury (Schermerhorn v. Talman, 4 Kern. 127). Nor is a right of action to avoid notes or contracts, on account of usury, assignable." To which may be added, as directly in point, the case of The Mechanics' Bank v. Edwards (1 Barb. S. C. Rep. 271; S. C., 2 Barb. 545). In this case a learned justice of the Supreme Court said: "As to usury, it is well established that this is a personal defence, and cannot be set up by a stranger to the original transaction (Reading *v. Weston,* 7 Conn. 413; *De Wolf v.* Johnson, 10 Wheat. 367). The Chancellor, in Cole *v.* Savage (10 Paige, 583), attempted to overturn this rule, upon the strength of the Revised Statutes (1 Rev. Stat. 772) and the Statute of 1837 (Laws of 1837, p. 487, § 4), and to extend the defence beyond the borrower and his sureties, heirs, devisees, and personal representatives, and confer it also upon the subsequent grantees of premises subject to a usurious mortgage. But the Court for the Correction of Errors, in Post v. Bank of Utica (7 Hill, 391), overruled his desision, and even under our peculiar statutes, confined the defence to those persons only who were bound by the original contract to pay the sum borrowed (Livingston v. Harris, 11 Wend. 329)."

The testimony of the husband of the Defendant, Dempsey, offered on her behalf, was properly excluded. He was not a party to the action, and could not, therefore, be a witness on his own behalf. He could not be a witness on the behalf of his wife (Macondray v. Wardle, 26 Barb. 612, affirmed at General Term, S. C., and not reversed in Court of Appeals). The judgment of the General Term of the Superior Court of New York should be reversed, and the final judgment of the Special Term, entered May 3d, 1862, be affirmed with costs.

All concur. Reversed.

JOEL TIFFANY,
State Reporter.

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SAMUEL W. WRIGHT, RESPONDENT, v. JACOB SAUNDERS, APPELLANT.

Negligence—Leaving Post-holes in Street open at Night.

A Defendant is liable for damages resulting to Plaintiff for digging post-holes on the line of his lot and the street, extending into the travelled part of the sidewalk, and leaving them open during the night, without any guard or protection, by reason of which the Plaintiff stepped into the hole and was injured.

F. Keman for Appellant.
Hardine & Burrows for Respondent.

DAVIES, CH.J.—This action is to recover damages for the negligence and wrongful acts of the Defendant, in having dug post-holes in a public street, in the village of St. Johnsville, and leaving the same open and unguarded, into which the Plaintiff stepped in the night-time, and injured his limb. The action was tried before a referee, who gave judgment for the Plaintiff, and the same was affirmed at the General Term.

The facts found by the referee are as follows:

First. That the Defendant, in the month of November, 1863, owned and occupied a village lot in the village of St. Johnsville, bounded by a public street of said village, used by foot passengers, and at the time excavated several holes for fence posts along the line of and contiguous to said street, one of which extended into the travelled part of said street, and to the depth of two and one-half feet.

Second. The said Defendant, after digging such holes, carelessly and negligently omitted to cover or guard the same, and omitted to use any means to warn persons passing along the said street of the location of said excavations.

Third. On the 21st day of November, 1863, the Plaintiff, while passing along the said walk of said street, in the night-time, and ignorant of said excavation, accidentally stepped into

Appeal—Weight of evidence—Review. 32 *Hun,* 343; 25 *St. Rep.* 682 (6 *N. Y. Supp.* 924).

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the same, and his knee was thereby greatly injured, and the knee-pan thereof broken.

Fourth. The said Plaintiff suffered damages, by reason of expenses for medical aid, loss of time, and incapacity for labor, to the amount of two hundred dollars, from the said acts of the said Defendant.

Fifth. The Plaintiff did not contribute by any fault or negligence to his injury.

And as a conclusion of law the referee found that the acts and conduct of the Defendant were negligent and careless and produced the injury to the Plaintiff aforesaid, and that the Plaintiff was entitled to recover therefor the said sum of two hundred dollars.

Judgment was therefore given for the Plaintiff, and affirmed at General Term.

Upon these facts, which are conclusive upon this court, the case is a very clear one. The Defendant's liability for the injuries caused to the Plaintiff from his illegal, carless, and negligent acts, is unquestioned.

It needs no citation of authorities to demonstrate it.

No exception was taken on the trial, or insisted on, to the admission or rejectment of any evidence. It follows that the judgment should be affirmed, with costs; and as I can see no merits in this appeal, I suggest an affirmance with ten per cent. damages.

All affirm.

JOEL TIFFANY,
State Reporter.

HENRY W. ROSEBROOKS *v.* WILLIAM B. DINSMORE.

Evidence—Objections to Pleadings or Proofs, when to be taken.

Objections to the pleadings or the proofs must be taken at the trial to be available on review.

SCRUGHAM, J.—The gravamen of the action is the loss of the property through the negligence of the Defendant.

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The agent of the Plaintiff's assignor had the right to demand and receive it, when he applied for it at Sandy Hook; the property was not then in transitu, but had reached its destination, as the contract was to convey it to Harper's Ferry, or to the Defendant's agency nearest or most convenient to it. Such was Sandy Hook, and the goods could not at that time be taken by farther by the Defendant.

The agent of the Plaintiff's assignor was authorized by the Defendant's agent at Harper's Ferry to apply for the goods at Sandy Hook.

The refusal to deliver them was wrongful and its result was their loss. The wrong would not have been committed but for the negligence of Defendant in not sending a proper way-bill.

The box of candies was delivered, by mistake of Defendant's agent, to the wrong persons, and lost to Plaintiff's assignor.

There can be no doubt of this loss being attributable to Defendant's negligence.

It was not claimed on the trial that the case proved varied from that pleaded; nor was any of the evidence objected to on the ground that it did not correspond with the allegations of the complaint.

If that objection had then been taken, the referee might have permitted an amendment of the complaint, and if the Defendant alleged surprise, might have imposed terms to prevent it. It was late for the Defendant to be surprised after report. The order granting a new trial should be reversed, and the judgment entered on report of referee affirmed.

Judgment accordingly.

JOEL TIFFANY,
State Reporter.

Appeal—Failure to accept. 19 *Misc.* 193 (43 *N. Y. Supp.* 236); 7 *Abb. N. S.* 264; 1 *Sweeny,* 521.

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LOREN L. TOMPKINS, RESPONDENT, v. TITUS IVES, APPELLANT.

Time of offer—Costs—Code, § 385.

An offer to permit the Plaintiff to take judgment under § 385 of the Code of Procedure must be construed as an offer in the action at the time it is served, in its then condition; and has no reference to the case when changed in its condition by future proceedings.

If the Defendant subsequently set up a counter-claim, which is also extinguished by the subsequent judgment of the Plaintiff, and which together with the judgment amount to more than the Defendant offered to permit judgment for, the Plaintiff will be entitled to costs.

APPEAL from the Supreme Court.—The action was for work labor, and services, and board and lodgings furnished to the Defendant and his servants. The Plaintiff recovered $69.80. There was no appeal from the judgment to the General Term. The appeal to this Court is from the judgment at Special Term, on the findings of the referee, and from an order at the General Term affirming an order awarding full costs to the Plaintiff. The Appellant claimed that he had made an offer more favorable to the Plaintiff than the judgment recovered, and that he was entitled to the costs which accrued subsequent to the offer. The material facts were these:

The complaint alleged the facts on which the Plaintiff based his claims, and no facts showing the existence of any counter-claim.

Judgment—Offer—Acceptance—Effect. 63 *N. Y.* 267; 150 *N. Y.* 188; 45 *Hun,* 431 (9 *St. Rep.* 463; 13 *Civ. Proc.* 5); 77 *Hun,* 594 (60 *St. Rep.* 497; 28 *N. Y. Supp.* 1048); 94 *App. Div.* 499 (87 *N. Y. Supp.* 1100); 99 *App. Div.* 252 (90 *N. Y. Supp.* 990); 8 *Misc.* 622 (61 *St. Rep.* 325; 29 *N. Y. Supp.* 823); 28 *Misc.* 448 (58 *N. Y. Supp.* 1132; 29 *Civ. Proc.* 339); 30 *Misc.* 86 (61 *N. Y. Supp.* 869); 34 *Misc.* 716 (70 *N. Y. Supp.* 62); 34 *Misc.* 717 (70 *N. Y. Supp.* 63); 12 *Civ. Proc.* 314.

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Four days before the answer was interposed, the following offer was served: "The Defendant herein offers to allow the Plaintiff to take judgment against him in this action for $70, besides costs and disbursements.—Watertown, Jan. 31, 1865." This offer was not accepted. On the 3d of February the Defendant served his answer, setting up, among other things, counter-claims for goods sold and services rendered.

The referee found, as matter of fact, that the demands of the Plaintiff, established on the hearing, were $336.40; that the amount of the Defendant's payments and counter-claims was $268.61, and that the Plaintiff was entitled to judgment for the balance, $67.79, with interest, amounting in all to $69.80, and for that amount judgment was entered. The counter-claims allowed by the referee embraced, among other things, the value of corn, butter, and other articles sold by the Defendant to the Plaintiff, amounting to $37; so that if this allowance had not been made, the recovery would have largely exceeded the sum named in the offer.

The Clerk adjusted the costs on the theory that the judgment was less favorable to the Plaintiff than the offer. The Court ordered a re-taxation, with an allowance of full costs to the Plaintiff; and this order was affirmed on appeal to the General Term in the Fifth Judicial District. The case is reported in 30 How. 13.

Brown & Beach for Appellants.
Moore & McCartin for Respondents.

PORTER, J.—The import and effect of the order must be determined by the condition of the pleadings at the time it was made. It did not mean one thing then, and another four days afterward. The answer was not designed to vary the terms of the previous prohibition, but to take issue on the Plaintiff's demand, and to introduce cross-claims on the part of the Defendant for the purpose of reducing or defeating a recovery, if no notice was given within the ten days allowed by law. The intermediate pleading was, in its nature, provisional; and a notice of acceptance, whether served on the first or the tenth day,

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could apply only to the original offer. It would operate upon the Plaintiff's claim, but not upon independent causes of action existing in favor of the Defendant. The litigation resulted in a recovery more favorable to the Plaintiff than the offer. The nominal amount was less than the sum proposed; but, in determining the right to costs, the Plaintiff is entitled to the benefit of the counter-claims, which the Defendant afterward elected to interpose, and which are now extinguished by the judgment (Code, sec. 385; Fieldings *v.* Mills, 2 Bosworth, 489; Ruggles *v.* Fogg, 7 Howard, 324; Budd *v.* Jackson, 26 lb. 401; Schneider *v.* Jacobie, 1 Duer, 694).

The judgment should be affirmed.

BOCKES, J.—Without considering the objection urged, that the appeal is irregular, I am of the opinion that the order awarding costs to the Plaintiff was properly granted. The facts bearing on this question are as follows: The Defendant's attorney, before answering the complaint served on the Plaintiff's attorney, made an offer under section 385 of the Code of Procedure, consenting that he might take judgment in the action for $70, and costs. The offer was not accepted; an answer was served three days after the service of the offer, setting up payment, and also counter-claims amounting to $100.42. On the trial before the referee the Plaintiff recovered a trifle less than the sum offered. When an offer for judgment is given, pursuant to section 385, the Plaintiff has ten days within which to accept it, and the section provides that if the offer be not accepted, and "if the Plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but must pay the Defendant's costs from the time of the offer."

The question now is, was the judgment recovered more favorable to the Plaintiff than the offer? The Plaintiff insists that it was more favorable, because, in addition to the recovery, counter-claims to the amount of $100.42 were extinguished. The offer should be construed as an offer in the action at the time it was served, in its then condition. It had no reference to the case when changed in its condition by future proceedings.

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In effect it was this: As the case now stands between us, I will allow you to take judgment for the sum offered. It meant this, and nothing more, when served, and its signification could not be enlarged from day to day afterward, without any intimation from the Defendant of its more comprehensive import; and the section under which the offer was made evidently contemplates that it should take effect at the time of service, for it provides that if the Plaintiff fail to obtain a more favorable judgment, he must pay the Defendant's costs from *the time of the offer.*

Giving effect to the offer, as of the time of its service, and it is very obvious that the Plaintiff obtained a more favorable judgment than he would by its acceptance—in this, that by the judgment, counter-claims to the amount, as set forth in the pleading, of $100.42, were extinguished. He was therefore entitled to recover the costs of the action, the same as if no offer had been served in the case.

All concur in the opinions of PORTER and BOCKES, JJ., except HUNT, who dissents.

Judgment affirmed.

JOEL TIFFANY,
State Reporter.

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THE PEOPLE EX. REL. AUGUSTE NOEL ET AL., RESPONDENTS, v. RICHARD KINGSLAND, APPELLANT.

Contempt—Injunction—Drawing Money in Bank.

A Defendant enjoined from disposing of his property and effects, having money in bank, which he draws out upon his checks, is thereby guilty of contempt, and may be punished accordingly.

This was an appeal from an order adjudging the Defendant guilty of a contempt, and imposing upon him a fine of $1,000. The General Term reduced the fine to $400, and affirmed the original order to that extent. The facts are stated in the opinion of the Court

E. More for Appellant.
J. T. Glover for Respondent.

HUNT, J.—This was a proceeding supplementary to execution, under the provisions of the Code on that subject. The object was, to compel the payment of a judgment of $3,384.20, rendered on the seventh day of July, 1865. At the time of serving the order, the relator caused to be served upon the Defendant an order in the nature of an injunction order, by which he was forbidden to transfer or make any disposition of his property, or in any manner to interfere therewith, until the further order of the Court.

The Defendant was examined on various days, commencing in October, and ending on the fourteenth of December, 1865. It appeared from his testimony that he had in the Manhattan Bank to his credit, at the time the order was served upon him, the sum of $546.15, and that, during the month of October, he drew out upon his check all the money except a balance of $31.-65. The bank account was headed "Manhattan Bank in account with Richard Kingsland, in trust." It further appeared that the moneys so drawn were drawn upon checks signed by the Defendant, individually, and expressed to be for "family," for "board," for "office," for "diff. on stock," "Ed. Baldwin." Upon an order to show cause, the court below adjudged him guilty of a contempt in using this money, and imposed upon

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him a fine of $1,000. Upon an appeal to the General Term, the sum was reduced to $400, and the order was affirmed to that extent. The Defendant now appeals to this Court.

In support of the appeal it is urged that the Defendant was doing business as an agent for his wife, that the money deposited in bank belonged to her, and that since the recent statutes she was authorized thus to transact business, and authorized to employ her husband as her agent for that purpose.

These questions do not arise. If the business had been transacted in the name of Mrs. Kingsland, and the money had been deposited to her credit, a different question would have been presented. The legal title to the money in bank would have been in her. As the case stands, the legal title to the money, and to all of of it, was in the Defendant; and the claim of the wife and of Baldwin, so far as they had claims, gave them no legal title to the specific money in bank. If the Defendant was in truth acting as the agent for his wife, and all the money under his control, either in bank or upon his person, was the result of the business transacted for her, I do not say that she had not an equitable claim to the money. If the "$157.50 paid E. A. Baldwin," was a balance due to Mr. Baldwin upon sales of stock for his account, it is quite certain that he ought to have been paid that amount. But whether, in either of these cases, the creditors would have had an equitable lien upon the specific fund, or whether they were simply creditors at large of Kingsland, it is not now necessary to consider. It is sufficient for the present purpose that the legal title to the money was in the Defendant, and that no proceedings had been taken to enforce the equitable claim of any other party. In using and disposing of the money, he violated the injunction order served upon him.

It appears also, from the testimony of the Defendant, that his funds in bank were in part the produce of his business as a broker; that he received money for others, and also his commissions; that he did his business as a broker in his own name; that his commission as a broker sometimes amounted to $500 per month, and these funds, as well as the amount of sales of stock, constituted his deposits in bank. Whatever might be the claim of his wife, upon a settlement of his accounts with her as

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her agent, it is plain that the money thus earned by the services of the Defendant, and deposited to his own credit in the bank, was the money of the Defendant. When he used this money, as stated in the case, he violated the injunction order forbidding him to interfere in any manner with the funds or property belonging to him.

The order should be affirmed, with costs.

PARKER, J.—The evidence before the justice of the Supreme Court who made the order adjudging the Defendant guilty of contempt in disobeying the injunction order obtained against him, was sufficient to warrant the decision made.

He paid out, after the service of the order upon him, of moneys on hand at the time of such service, over $800. This was money deposited to his credit in the bank, and though the account was kept by the bank with "Richard Kingsland, in trust," yet all his deposits were credited to that account. He was doing business as a stock-broker in his own name, and on his own account. If he sold stock for other persons, whether his wife or others, he deposited the proceeds to that account. He also deposited his own earnings, or portions of them, to the same account.

Now, of the $800 expended by him, 356.25 was individually expended for himself and family. The presumption most favorable to the Defendant, taking his own theory that the moneys received by him from sales of stocks for his wife and others he held in trust, is, that these expenditures were from his own portion of the moneys on deposit.

The General Term, taking the most favorable view for the Defendant, reduced the fine from $1,000 to $400. This latter sum was surely not an unreasonable amount to indemnify the relators for the withdrawing of the $356.25 from being applied to their judgment, and to satisfy their costs and expenses of the proceeding.

The order appealed from should be affirmed, with costs.

All affirm.

JOEL TIFFANY,
State Reporter.

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PHINEAS L. ELY, SUCCESSOR, &c., RESPONDENT, *v.* THE BOARD OF SUPERVISORS OF NIAGARA COUNTY, APPELLANTS.

Nuisance—Bawdy House—Destruction by Mob—Recovery against County.

A house kept at a house of ill-fame or bawdy house, and as a resort for thieves and other disreputable persons, although a common nuisance, and subject to indictment, does not constitute such negligence on the part of the keeper thereof as to prevent a recovery against the county when the same has been destroyed by mob violence.

APPEAL from a judgment of the Supreme Court, rendered at General Term in the Eighth District, affirming a judgment entered on a verdict in favor of Maria Moody, the Plaintiff's assignor, for $4,500, rendered on trial at circuit in Niagara county, Hon. Noah Davis presiding.

The action was brought by the said Maria Moody, under the "Act to provide for compensating Parties whose Property may be destroyed in consequence of Mobs or Riots," passed April 13, 1855, to recover damages for the destruction of two houses and their furniture belonging to her, and situate in the village of Niagara city, in Niagara county. The property was destroyed by fire on the 15th of September, 1865, in consequence of a mob or riot. The owner did not ever, at any time, notify the sheriff of Niagara county of any threat or attempt to destroy the property, or of any facts brought to her knowledge. It was shown that she was not apprised of any such threat or attempt until the destruction had considerably progressed, and that when so apprised she was unlawfully taken into custody by the police, or others acting in concert with the rioters, and confined in the lock-up of the village, where she was detained until after the destruction was complete.

Nuisance—Abatement. 83 *N. Y.* 190; 119 *N. Y.* 239 (29 *St. Rep.* 581); 21 *App. Div.* 355 (47 *N. Y. Supp.* 646.

Riots—Municipal liability—Procedure. 126 *N. Y.* 490 (37 *St. Rep.* 834); 24 *Hun,* 564; 53 *Hun,* 196 (24 *St. Rep.* 944; 6 *N. Y. Supp.* 716); 50 *App. Div.* 155 (64 *N. Y. Supp.* 415); 30 *App. Div.* 189 (51 *N. Y. Supp.* 1071).

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The houses, with the furniture were kept and maintained by the owner, at the time of their destruction, as bawdy houses, and so had been kept and maintained for a long time previous.

The Defendants, on the trial, offered to show that the houses and furniture, at the time of their destruction, were kept by the owner, not only as bawdy houses, but also as a resort and rendezvous of thieves, robbers, and murderers, with other facts stated at large in relation to this offer in the opinion. This evidence was rejected, and the Defendants excepted.

There was no evidence tending to show that the destruction of the property was occasioned or in any manner aided, sanctioned, or permitted by the carelessness or negligence of Maria Moody, other than that tending to show the purposes for which the houses were kept, and their character.

Maria Moody assigned the verdict to the present Plaintiff, before the case was heard at the General Term, and he was substituted as Plaintiff by an order of the Court.

SCRUGHAM, J.—The only questions presented by the printed argument of the Appellant, are as to the necessity of notice to the sheriff, and as to the carelessness or negligence of the Plaintiff.

It is not pretended that it was possible for the Plaintiff to give the notice required by the provisions of the act, under which her action is brought, before the destruction of her property was complete; but it is insisted that, as she did not afterward give the notice, her action cannot be maintained.

The notice which the act requires is not of the injury or destruction of the property, but of the facts brought to the knowledge of the owner, showing any threat or attempt to destroy it; and the object of requiring it is fully disclosed by the only duty expressed in the act, which its receipt imposes upon the officer to whom it is given, which is, "to take all legal means to protect the property attacked or threatened," a duty impossible of performance after its total destruction.

One of its good effects, if it should be received by the Sheriff in time, would be to enable him to arrest the rioters while the

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riot was progressing; but this he would not do by virtue of any power conferred by the notice, but under his general authority as a peace officer.

No benefit in this respect, however, could be derived from the notice after the rioters had dispersed, for the sheriff could not then arrest them without warrant, and the duty of procuring such is no greater upon him than upon the person who gives the notice, or any other citizen having knowledge of the facts.

It was proved on the trial that the houses which were destroyed were kept and maintained by the Plaintiff as bawdy-houses at the time of their destruction, and had been so kept for a long time previous thereto; and the Defendants also offered to prove that they were also kept as a resort and rendezvous of thieves, robbers, and murderers; that such and other disorderly and wicked persons were notoriously accustomed to be received, entertained, and harbored in them by the Plaintiff, to the great fear, danger, and apprehension of all the people of the town of Niagara; and that during the night preceding their destruction, divers of the criminal and wicked persons whom the Plaintiff was accustomed to receive and habor in them, murdered a resident and citizen of the town, in the highway near the houses, while he was in the exercise of his duty as a policeman; and that on the fact of such murder being publicly made known the next morning, and the body being found in the highway, close by the Plaintiff's house, "great exasperation, excitement, and indignation were caused and excited among all the people in said vicinity and town."

The Defendants claim that the exclusion of this testimony by the Court was error, as it was calculated to establish such carelessness or negligence in the Plaintiff as would bar her right to recover against the county.

The 3d section of the act provides that no person shall be entitled to recover against a city or county for the damages sustained by reason of his property being destroyed or injured in consequence of a mob or riot, "if such obstruction or injury was occasioned, or in any manner aided, sanctioned, or permitted by the carelessness or negligence of such person." To keep a

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bawdy house and place of rendezvous for thieves and murderers is criminal wickedness; but, considered only in reference to the safety of the house and furniture used, it cannot be regarded as carelessness or negligence; for it is not an act which of itself would naturally cause or contribute to produce the injury or destruction of the property; but it is urged that such a use of a house occasions riot, and "stirs up the virtuous indignation of contiguous society, who injure the property on this account," and therefore that such use of the property is carelessness or negligence, which occasions, or in some manner aids, its destruction or injury.

A house kept as a house of ill-fame, and as a resort for thieves and other disreputable persons, is a public and common nuisance; but the destruction of the building and its furniture is not necessary to its abatement, and is unlawful; so too are riots and mobs.

The keeping of such a house may justly excite the virtuous indignation of persons residing in the neighborhood, but in no manner authorizes or justifies their unlawful acts; nor can it be said that in well-governed communities it occasions riots, or leads to the destruction or injury of the property through the indignation of the public; for this, in such communities, will be kept within lawful bounds by the public authorities, whose duty it is to prevent all riots, and to protect all property from injury by them.

The property of the Plaintiff was not put beyond the pale of the law's protection by her detestable and criminal conduct; she still had the right to expect it, and to rely implicitly upon the zeal and ability of the proper public officers to defend her house and furniture against the unlawful effects of any public indignation her evil practices might provoke.

She was not to assume that the officers would not or could not perform their duty effectually; and therefore, having no reason to fear the injury or destruction of her property by a riot or mob, she was not careless or negligent in not anticipating that such would be the result of the evil use to which she applied the property.

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But the carlessness and negligence referred to in the act are such as actually occasion or proximately contribute to the injury or destruction of the property; as the opening of a window and its fire-proof shutters, in a house adjoining one in conflagration at the time, through which burning embers enter and set fire to the house.

In such a case no action could be maintained under this act, although the adjoining house was fired by a mob, for the negligent act of opening the windows and shutters would be considered as occasioning or aiding the destruction of the property. But the conduct of the Plaintiff was not such a cause as would naturally produce or aid in producing the destrucion of her property; and its influence in that direction is too remote and uncertain to permit of its being considered such carlessness or negligence as would bar her recovery.

All that her conduct can stritly be claimed to have produced, was local public indignation; and this, lawfully manifested, would not have occasioned, or in any manner aided, in the destruction of her property.

Being misdirected, but not through her agency, it produced the riot, and the violent and unlawful acts of those engaged in it occasioned the injury.

The construction for which the Defendants contend requires the substitution of the words "mob or riot," for the words "destruction or injury," in the 3d section of the act.

That this substitution was not made by the legislature is a sufficient indication that it was not intended the act should be so construed.

The evidence offered was properly rejected, and as that which was received did not establish carelessness or negligence within the meaning of the act, the judgment should be affirmed.

All the judges concurring,

Judgment affirmed.

JOEL TIFFANY,
State Reporter.

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SAMUEL J. ROCKWELL, &c., RESPONDENT, v. GUERDON H. BROWN, APPELLANT.

Practice—Slander—Malicious Prosecution—Same cause of Action.

Where an action of slander is prosecuted on a charge made for the purpose of causing the arrest of a party, and said party has prosecuted to judgment an action for malicious prosecution for the arrest thus made, such action for slander cannot be maintained, on the principle that a party is not entitled to two recoveries for the same cause of action.

McDowell & Edwards for Appellant.
A. J. Parker for Respondent.

DAVIES, CH.J.—This action was commenced in January, 1861, to recover damages alleged to have been sustained by Plaintiff, by reason of slanderous words spoken by the Defendant.

The complaint alleges that on the 19th of January, 1860, the Defendant, in the presence of divers good citizens, &c., stated that the Plaintiff stole his cow. The Defendant denied the complaint, and set up other defences in his answer, some in bar and others in mitigation of damages.

The cause was referred by consent of parties, and tried before the referee in October, 1861, who made his report in favor of the Plaintiff for fifty dollars damages, and judgment thereon was perfected for the Plaintiff, and the same was affirmed at the General Term. The Defendant now appeals to this Court.

The following are the facts found by the referee:

1. That the Defendant spoke the words mentioned in the complaint at the time therein alleged.

2. That the words so spoken by the Defendant were untrue.

3. That the words so spoken were wilfully and maliciously spoken by the Defendant.

4. That on the 9th day of April, 1860, Plaintiff commenced an action against the Defendant in the Supreme Court, for a

Joint tort feasor—Separate liability. 75 *N. Y.* 499; 100 *N. Y. Supp.* 185.

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malicious prosecution of said Plaintiff by said Defendant, in causing said Plaintiff to be arrested upon a warrant issued against him by James Comstock, Esq., a justice of the peace of Marathon, in the county of Cortland, upon the charge and accusation of having stolen a cow from the Defendant.

That the charge and accusation of stealing, upon which said warrant was issued against the Plaintiff, was a similar charge and accusation of having committed the same offence which was made by the Defendant in speaking the said words mentioned in the complaint.

That the charge and accusation upon which said warrant was issued, although relating to the same transaction referred to by the Defendant, in speaking said words, was made previous to the speaking of said words by him.

That the Plaintiff prosecuted said action for malicious prosecution to trial and judgment, and upon the trial thereof, which took place at the Broome county circuit, in September, 1860, he had a verdict in his favor for sixty dollars, upon which judgment was duly entered on the 3d day of June, 1861.

And the referee found as conclusions of law:

1. That said action for malicious prosecution, and the verdict and judgment therein, were no defence to this action, either in bar or mitigation of damages.

2. That the Plaintiff had sustained damages in this action to the amount of fifty dollars, and that he was entitled to judgment therefor.

It is now contended, on the part of the Appellant, that the recovery by this Plaintiff, in the action for a malicious prosecution by this Defendant, is a bar to a recovery for damages for the words spoken, and the case of Sheldon v. Carpenter (4 Coms. 579) is relied on. But an examination of the facts of that case, upon which it was decided, will show that they are unlike those presented in the case at bar. Then the slanderous words were spoken with a view and for the purpose of causing the arrest of the Plaintiff in Rockland county, and having him conveyed to the city of New York, where the Defendant professed to be able to make good the charge. The Plaintiff was

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accordingly arrested, brought to the city of New York, lodged in jail, and the next day the charge was abandoned, and the Plaintiff was accused of a different offence, but was discharged from custody. The Plaintiff brought an action of slander for the words spoken, and on the trial the Defendant offered to prove that the Plaintiff had therefore prosecuted a suit against the Defendant and others for a malicious prosecution, in causing him to be arrested and taken to New York *on the same charge* for which the present action of slander was brought, and that the Plaintiff had in that suit recovered a verdict of $5,000.

The evidence was objected to and excluded, and this Court held that such exclusion was improper. Judge Ruggles, in delivering the opinion of the Court, said: "In an action for malicious prosecution, the Plaintiff is entitled to recover damages, not only for his unlawful arrest and imprisonment, and for the expenses of his defence, but for the injury to his fame and character by reason of the false accusation. The latter indeed is, in many cases, the gravamen of the action. An accusation of crime, made under the form of law, or on the pretence of bringing a guilty man to justice, is made in the most imposing and impressive manner, and may inflict a deeper injury upon the reputation of the party accused, than the same words uttered under any other circumstances. The most appropriate remedy for the calumny in such cases is by the action for malicious prosecution. The injured party cannot be entitled to two recoveries *for the same cause,* and a recovery in that form must, therefore, be a bar to a subsequent action of slander, *for the same identical accusation.*"

The arrest of this Plaintiff, for which, on the 9th of April, 1860, he brought his action for malicious prosecution, was made on the 7th day of October, 1859, and he was discharged on the 9th day of October, in that year.

The slanderous words for which this action is brought were uttered on the 19th of June, 1860.

The recovery, therefore, in the suit for malicious prosecution, could not have been, and was not, for the same identical

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accusation. The Plaintiff recovered in that suit not only for his unlawful arrest and imprisonment, but for the injury to his fame and character, by reason of the making of that false accusation. He received nothing for the utterance of the slanderous words after that prosecution had terminated. That prescribed an independent cause of action, and the referee properly held that the recovery of damages in the action for the malicious prosecution furnished no bar to a recovery in this action.

It is insisted that the referee erred in excluding the offer of the Defendant to show that when the Plaintiff was arrested upon the charge of stealing the cow, and brought before the magistrate, he settled with the Defendant for taking the cow, and was discharged without an examination.

I am unable to see how this evidence would have benefited the Defendant, if it had been admitted. It certainly did not tend in any degree to show that the Plaintiff had stolen the cow. On the contrary, the inference would be from the offer, that the taking was to the extent of a trespass, for which the parties settled. We cannot assume that the Defendant offered to show that he compromised a felony, or that we could infer from the offer that the Plaintiff admitted that he had committed one.

But a conclusive reason for rejecting it is found in the fact that it related to a transaction which occurred several months prior to the speaking of the slanderous words, and the fact offered no justification for charging the Plaintiff with theft. The offer would have been appropriate in the action for the malicious prosecution, but was properly excluded on this trial.

Josiah Hopkins, a witness for the Defendant, in his cross-examination, was asked, "Did you tell him (Plaintiff's father, Peter Rockwell), at his house, last July, that Brown told you that Plaintiff stole his cow?" The witness answered, "I did not tell him so. I know what I did tell him."

The Plaintiff then called Peter Rockwell, who testified: "I know Josiah Hopkins; he was at my house in July last." He was then asked this question: "Did Josiah Hopkins tell you

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in July last, that Defendant told him that Plaintiff stole Defendant's cow?"

The Defendant objected on the grounds—

1. That the question does not confine the witness to any place of the alleged conversation.

2. It does not refer to the time when Hopkins had the conversation with Brown, at Underwood's, testified to.

3. That it is immaterial.

None of these grounds are tenable. Preliminary to the question, the witness had testified that he knew Hopkins, and that Hopkins was at his house in July last.

The question was then put in the form above quoted. I think there was a sufficient indication of the place at which the conversation was held, and the whole answer of the witness points unerringly to the conversation at his house, of which Hopkins had been inquired about. The ruling of the referee falls within the doctrine laid down by this Court in Pendleton *v.* Empire Stone Dressing Company (19 N. Y. 13, 18).

The witness Hopkins had his attention called with reasonable certainty to the conversation with Rockwell, and it is manifest that the latter witness referred in his testimony to the same conversation of which Hopkins had been inquired of.

The judgment appealed from should be affirmed, with costs.

Affirmed.

BOCKES, J.—The words charged in the complaint were slanderous, and were proved to have been uttered as charged. It was insisted, however, that the Plaintiff had already recovered for the injury in an action against the Defendant for malicious prosecution. But the case shows that the slanderous words counted on, and for which the recovery was allowed, were uttered more than three months after the cause of action for malicious prosecution arose.

The grounds of action were separate and distinct—were wholly disconnected one with the other—therefore unlike Sheldon *v.* Carpenter (4 N. Y. 578). The actions might have been

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joined in one; but it is no objection to a recovery that they were not.

The Defendant on his examination testified that he made complaint against the Plaintiff for stealing a cow, and that he was arrested and brought before the justice. He was then asked, "How was the matter disposed of after Plaintiff was brought before Esquire Comstock?" The question was not allowed. In this ruling there was no error. How the matter was disposed of, either by the justice or by the parties, was of no importance in this action for slanderous words spoken three months afterwards, hence the evidence proposed was immaterial. If offered with a view to show an admission by the Plaintiff that he did not steal the cow, the object should have been stated, or the question should have been so framed as to suggest the purpose. If to show how the justice disposed of the complaint, waiving the objection of irrelevancy, it was a fact to be proved by the record. In any view that may be taken of it, the question was properly not allowed.

The question put to the witness Rockwell, with a view to affect the credibility of Hopkins, who had been examined on Defendant's behalf, was, I think, admissible. Hopkins had denied telling Rockwell in July that the Defendant said the Plaintiff stole the cow. Rockwell was then called and asked it Hopkins did so tell him in July, and answered that he did. The subject-matter to which Hopkins had testified, and in regard to which it was proposed to contradict him, was relevant to the issue. The only question is whether his attention was sufficiently directed to the conversation in which he made the statement imputed to him. It has been long settled that it is not sufficient to inquire generally of a witness, with a view to affect his credibility by contradicting him, whether he ever made the specific statement, without naming person, time, or place. His attention should be called to the occasion to enable him to explain, or exculpate himself in regard to the imputed contradiction.

How specific the cross-examination should be in such case was considered by Judge Denio in Pendleton *v.* Empire Stone Dressing Co. (19 N. Y. 13), where it was held that the occa-

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sion of the supposed conversation should be pointed out to the witness with reasonable certainty, as by indicating the place, the purpose of the interview, or other circumstances likely to call it to the mind of the witness. As a general and safe rule of examination the time and place as well as the person should be named, but it seems that each and all of these are not absolutely essential, when the occasion is clearly indicated by other circumstances. In this case Hopkins was asked whether he told Rockwell at his house in July that the Defendant said the Plaintiff stole the cow. He answered, "I did not tell him so." He also stated that he did not tell him that, last July. Here his attention was called to person, time, and place in one instance, and to person and time in the other. The occasions were, therefore, sufficiently specified to admit of contradiction as to either statement within the rule laid down in Pendleton *v.* Empire Stone Dressing Co., above cited.

The judgment should be affirmed.

All the judges concurred.

JOEL TIFFANY,
State Reporter.

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JAMES H. CASE, RESPONDENT, v. HIRAM A. HOTCHKISS, APPELLANT.

Account rendered—Account stated—Interest.

Where an account has been rendered to which no exceptions are taken, it may be regarded as an account stated, upon which interest may be demanded.

PARKER, J.—This is an action to recover for the services of the Plaintiff's assignors, as attorneys and counsellors-at-law. Only two exceptions appear in the case to have been taken upon the trial, and these raise the only questions which we can consider.

The first was to the decision of the Court sustaining the Plaintiff's objection to the following questions put by the Defendant's counsel to the Plaintiff's witness on cross examination: "Was there anything to argue?" The question referred to the argument of an appeal at the General Term, in an action which the Plaintiff's assignors defended for this Defendant. The witness (who was one of said assignors) had already testified that the appeal was taken under Defendant's direction, which evidence was uncontradicted in the case, and that he and his partners had paid other counsel for arguing it at the General Term. The manifest point of the inquiry was, not whether the case was before the General Term in a condition to be argued, but either, whether there was any question presented for argument in the case as made, or, whether there were any merits in the question presented to the Court. Whatever was intended, the question was properly excluded. Whether the case presented to the Court any question for its consideration, or whether the question presented had any merit or not, was quite immaterial, inasmuch as the attorneys had been employed by the Defendant to carry the case to the General Term, and were thereupon bound to see that it received the attention necessary to obtain the decision of the General Term, sought for by the

Account rendered—Silence—Presumption. 9 *Hun,* 107.

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appeal. Neither was it material with reference to the question whether an argument was in fact had. The obligation of the attorneys to be in attendance, by themselves or counsel, was the same in either case, and the fact that there was nothing to argue in the sense intended by the question, would have been no proper ground of inference that it was not, in fact, argued, in the legal sense of submitting the case to the General Term for decision. Besides, it became a matter of no importance in the case, from the fact that it was subsequently shown that the amount was liquidated by the Defendant's admission, and no question was made as to the amount. The other exception is to the charge of the judge, in which he instructed the jury that they might allow interest upon the amount of the account. It appeared by uncontradicted evidence that the account, as claimed in the complaint, was rendered to the Defendant on the 25th of January, 1859, and no objection was ever made to it, in respect to the amount or otherwise, prior to the commencement of the action, which was more than a year, and the trial was had over two years after such presentation. The account was, I think, properly regarded as an account stated (Lockwood *v.* Thorne, 1 Kern. 170; Towsley *v.* Denison, 45 Barb. 490; Phillips v. Belden, 2 Edw. Ch. R. 1).

Being so regarded, it drew interest from the time when it was liquidated, which was at the time when it was rendered, inasmuch as no objection was ever made to it (Walden *v.* Sherburne, 15 John. 409; Patterson v. Choate, 7 Wend. 441; Feeter *v.* Heath, 11 Wend. 479).

On the merits, therefore, the judgment is clearly right, and should be affirmed.

But, moreover, the Appellant, when the cause was reached on the calendar, neither appeared to argue, nor subsequently furnished papers for the Court. For this reason the Respondent is entitled to an affirmance of the judgment, and I think also to ten per cent. damages for the delay occasioned by the appeal.

Judgment accordingly.

JOEL TIFFANY,
State Reporter.

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JAMES T. MAIN, RESPONDENT, *v.* GEORGE W. NILES, APPELLANT.

W. A. Beach for Respondent.
Calvin & Bingham for Appellant.

GROVER, J.—The complaint in one case contains all the averments necessary to show the Plaintiff's right to recover the rent demanded of the Defendant. This Court has repeatedly decided all the questions involved in favor of the Plaintiff. The judgment appealed from, affirming the judgment of Special Term, overruling the demurrer of the Defendant to the complaint, should be affirmed. In the other case, the complaint shows a right of recovery by the Plaintiff from the Defendant of the real estate demanded. The Defendant's demurrer thereto was properly overruled by the Special Term, and the judgment affirming the same should be affirmed by this Court.

All concur. Affirmed.

JOEL TIFFANY,
State Reporter.

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JAMES G. KING, AND ANOTHER, PLAINTIFFS IN ERROR, v. THE MAYOR, &c., OF NEW YORK, DEFENDANTS IN ERROR.

Street Openings—Commissioners' Report—Conclusive when?

The report of the commissioners appointed by the Supreme Court to assess damages, &c., sustained by persons whose lands have been taken for purpose of streets in the city of New York, when confirmed by the Supreme Court, is conclusive, and no appeal lies from such determination.

W. Tracy for Plaintiffs in Error.
R. O'Gorman for Defendants in Error.

DAVIES, CH.J.—This matter is brought before us by a writ of error, through the instrumentality of which the Plaintiffs in Error seek to review an order or judgment of the Supreme Court, dismissing an appeal taken by the Plaintiffs in Error from an order of the Special Term. Said order at Special Term was made in a proceeding instituted by the Mayor, Aldermen, and Commonalty of the City of New York, under chap. 86 (V. & W. 2, p 342) of the Revised Laws of 1813, for the purpose of ascertaining the compensation to be made to the owners of a certain piece or parcel of land, required for the purpose of opening Seventy-sixth street, from the Eighth Avenue to the Hudson River, in said city, and to assess upon the property benefited by the proceeding, the costs, charges, and expenses thereof, and the damages awarded for the land so taken.

The last clause of article 5, of the amendment to the Constitution of the United States, declares that "private property shall not be taken for public use, without just compensation,"

Street opening—Commissioner's report—Review. 50 *N. Y.* 497; 72 *N. Y.* 4; 4 *Hun,* 314; 4 *Hun,* 604; 61 *Barb.* 49, 485; 40 *How. Pr.* 37; 42 *How. Pr.* 222; 4 *Lans.* 473.

Summary of proceedings—Statute—Construction. 3 *Daly,* 175.

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and the last clause of § 6, article 1, of the Constitution of this State, is in the same words.

By § 7, of article 1, of the Constitution of this State, it is declared that "when private property shall be taken for any public use, the compensation to be made therefor when such compensation is not made by the State, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law." By an act passed April 3, 1807, Gouverneur Morris, Simeon De Witt, and John Rutherford were appointed commissioners to lay out into squares, avenues, and streets, all that part of the city of New York "to the northward of a line commencing at the warf of George Clinton, on Hudson River, thence running through Fitzroy road, Greenwich lane, and Art street, to the Bowery road; thence down the Bowery road to North street, thence through North street, in its present direction, to the East River." In pursuance of the provisions of this act, the commissioners made and filed the maps, therein required, on the 1st day of April, 1811. Chapter 86, of the Revised Laws of 1813, prescribes the mode in which compensation is to be made for the taking of the lands so laid out for squares, avenues, and streets, and the manner of payment therefor. Sec. 177 of said act declares that whenever and as often as the said mayor, aldermen, &c., shall be desirous to open any street, avenue, square, or public place, of any particular part or section of any street or avenue laid out by the said commissioners, under the Act of April 3, 1807, it should be lawful for the said mayor, &c., to open any such street, &c., or any section or part thereof, which the said mayor, &c., should deem necessary or useful, and make compensation and recompense to the parties and persons whose lands might be required therefor.

Sec. 178 provides that it might be lawful for the said mayor, &c., to make application to the Supreme Court for the appointment of three commissioners, who were designated in said act as "Commissioners of Estimate and Assessment." Said commissioners were to estimate the loss and damage to the various persons and parties whose lands were required for such street

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or avenue, or, in other words, fix the just compensation and recompense for the private property taken for public use; and, in the second place, said commissioners were to make a just and equitable estimate and assessment of the benefit and advantage to the owners of the several pieces of land benefited by said proceeding, and not required for the purpose of opening or laying out said street, avenue, &c.; and § 185 of said act declares that all the moneys which the said mayor, &c., shall be liable to pay for the compensation and recompense reported by said commissioners, and the charges and expenses of the estimate and assessment and report, and all such other expenses, disbursements, and charges as may be incurred by the said mayor, &c., in and about said proceedings, shall be borne and reimbursed and paid to the said mayor, &c., by the parties deemed to be benefited thereby; and if the sums assessed by the commissioners for benefit and advantage shall not equal said sums, then the said mayor, etc., were authorized to cause a further assessment to be made, to reimburse and pay all such sums, costs, charges, and expenses as they had incurred in and about said proceeding.

In pursuance of these provisions of law, the Defendants in Error applied to the Supreme Court of the First Judicial District to appoint three commissioners to estimate the just compensation and recompense to be paid for the taking of the lands required for the opening of Seventy-sixth street, from the Eighth Avenue to the Hudson River.

The Constitution prescribed that such compensation should be ascertained by at least three commissioners appointed by a court of record. The said commissioners were also directed to perform the other separate and distinct duty of making an estimate and assessment of the benefits and advantages accruing to the owners of lands benefited by said taking and opening, and not required therefor.

It would appear from the Estimate Book that said commissioners proceeded to discharge the duty enjoined upon them, and made an estimate of the just compensation and recompense to be made for the lands and property taken for such opening,

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and made an estimate of the benefit and advantage resulting from said opening to the various parties deemed by them to be benefited thereby. That said commissioners made their report herein in the manner required by law. That the Plaintiff in Error objected to the award made to one James P. Perkins, for the loss and damages sustained by him for the taking of a building standing in said street, and that said commissioners had included in said estimate for benefit and advantage, the sum of $5,576.84 for costs, charges, and expenses, in addition to the sum of $3,038 awarded by said commissioners for damages for property taken. A motion was made at the Special Term of said Supreme Court for the confirmation of the said report of the said commissioners; and, on hearing counsel on behalf of the parties, the same was confirmed; and on appeal to the General Term of said Court by these Plaintiffs in Error, from the said order of said Special Term, said appeal was dismissed.

And to review this judgment or order, this writ of error is brought.

The 178th section of the statute, already quoted, also declares that the report of said commissioners, when so confirmed by the said Supreme Court, shall be final and conclusive upon the said mayor, &c., and upon the owners, &c., and upon all persons interested in the lands, &c., mentioned in the said report, and also upon all other persons whomsoever; and that on such final confirmation of such report by the said Court, the said mayor, &c., shall be seized in fee of the lands mentioned in said report and required for the opening of said street, &c.,; and the said mayor, &c., are authorized immediately to take possession of the same.

Sec. 183 of the act makes it the duty of the said mayor, &c., within four calendar months after the confirmation of the report, to pay to the respective persons mentioned therein, to whom awards have been made, the sums so estimated and reported in their favor respectively; and in case of neglect to make such payment within that time, said persons were authorized to demand the same, and if not paid to sue for and recover

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the same, with lawful interest; and provision was also made for the collection of the said sums assessed for benefit and advantage.

The first question which presents itself for consideration is whether a writ of error lies to this Court to review the order of the General Term, dismissing the appeal to that Court. I am strongly inclined to the opinion that it does not, and that if these Plaintiffs could have reviewed in this Court the order of the General Term, it could only have been done by way of appeal. Sec. 1 of the Code of Procedure divides all remedies in the court of justice into actions and special proceedings, and § 2 defines an action to be "an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence," and the third section declares every other remedy a special proceeding.

Now, it cannot be questioned that the right given to the mayor, &c., to institute proceedings in a court of justice to perfect its title to lands required for a public street, avenue, &c., and to ascertain the just compensation to be made for the land so taken, is a remedy given to that corporation for that purpose, and not being an action, is necessarily a special proceeding. Under a similar proceeding, viz., a proceeding to assess damages for lands taken for a plank road under the general plank road law (Laws of 1847, chap. 210), the Supreme Court, at General Term in 1850, held, that it was a special proceeding within the Code, and a review was to be had by appeal (Ex parte Ransom, 3 Code Rep. 148). This Court in the matter of New York Centeral Railroad Company v. Marvin (1 Kern. 276), which was an appeal to this Court from an order of the Supreme Court, made at General Term, confirming the report of commissioners to appraise the compensation to be made for lands proposed to be taken under the general railroad act, cited this decision with approbation. And in the case just cited, this Court held, that inasmuch as all remedies in courts of justice are by the Code (§ 1) divided into actions and special proceedings, the application to the Supreme Court

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for the appointment of commissioners, and the appraisal, report and confirmation, must fall within the latter subdivision of remedies. And the same doctrine was reaffirmed by this Court in the case of the matter of extending Canal and widening Walker streets (2 Kern. 406). We must assume, therefore, in conformity with the repeated adjudication of this Court, that the proceeding sought to be reviewed in this Court by the present writ of error, is a special proceeding within the meaning and intent of the Code; and it follows that, if reviewable at all, it can only be reviewed by appeal in the manner pointed out by the Code. In 1854 (Laws of 1854, chap. 270), an act was passed in relation to special proceedings, and this Court held that in a matter like that now under consideration, this act was applicable. It provided that an appeal might be taken to the General Term of the Supreme Court from any judgment order or final determination made at any Special Term in any special proceeding.

In the matter of the widening of Wall street, a report of commissioners of estimate and assessment was presented to the Special Term of the Supreme Court for confirmation, and the same was refused. An appeal was taken from that order to the General Term of the Supreme Court, and heard upon its merits, although it was then only insisted that the order was not appealable (17 Barb. 617).

Another reason why this Court could not, if the order of the General Term were properly before us for review, examine the order and review the same is, that the statute already quoted declares the confirmation of the commissioners' report by the Supreme Court to be final and conclusive upon all persons whomsoever.

This Court, in the matter of The New York Central Railroad Company v. Marvin (*ubi supra*), held that similar language, under the general railroad act, precluded an appeal to the Court of Appeals.

Then the statute provided that the second report should be "final and conclusive" upon all the parties interested. Judge Parker, in the opinion of the Court, says: "The railroad act

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prescribes an entire system for ascertaining the value of the lands taken. It contains no express provision authorizing an appeal. It gives to the Supreme Court the power of granting a rehearing but once; and by declaring the second report 'final and conclusive,' it not only precludes any further action on the part of the Supreme Court, but cuts off also any appeal from such second report to this Court. This restriction is, I think, evidence of a design to limit the extent to which litigation should be permitted on a mere question of appraising the value of land, and to confine it to the several steps and hearings expressly permitted by the act."

But I understand the precise point now under consideration was disposed of by this Court, in the matter of Canal and Walker streets (*ubi supra*). In that case, a report of commissioners of estimate and assessment had been made in a similar proceeding to the one in this mater, and under the same statute. The original order of confirmation was made at Special Term, on the third day of December, 1853. An appeal was taken to the General Term of the Supreme Court, and in September, 1854, that Court, at a General Term in the First District, made an order affirming the order of the court made at Special Term. From this order of affirmance an appeal was taken to this Court, and, on motion, the appeal was dismissed, on the ground that the final determination of the Supreme Court was made by statute "final and conclusive," and such final order in that Court was not open to review in this Court. Judge Gardiner, in the opinion of the Court, pertinently observed: "The presumption certainly would be, that a Court, whose peculiar office was to supervise others, would not transcend its own jurisdiction; while the parties interested would have the judgment of men selected for their experience and legal knowledge, acting in view of a high official responsibility, with reference to what was due to their position, to the public, and to the opinion of an intelligent profession. The language of the statute in reference to a court clothed with such authority would be senseless, if not construed as it reads; that in cases of assessments for opening and widening streets, their orders and judgments 'should be final and conclusive upon all persons

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interested whomsoever.' Such is the case before us. That all should have been satisfied was not to be expected. But those who felt themselves aggrieved have had one or more hearings before the commissioners, another before the Supreme Court at Special Term, and a review of the whole proceeding before a full bench at the General Term of the same Court. In a great majority of these street cases, the controversy does not originate in a difference of views as to the laws of property or those affecting the jurisdiction of the Court, but in reference to the apportionment of the burden imposed in carrying out the improvement. These last present questions of fact almost exclusively, which cannot be reviewed here; and if they could, the chances of a correct decision would not be increased by a further departure from the source of the evidence. There is nothing, therefore, in the character of the Court pronouncing the judgment appealed from, or in the nature of the proceeding itself, that indicates improvidence, or inattention to the rights of parties by the legislature in declaring that the decision of the Supreme Court should be 'final and conclusive.' And there is nothing in either consideration to justify us in departing from the plain import of the provision, in order to sustain our own jurisdiction."

These views are decisive of the propriety of a review by this Court of the order made in this matter, without any reference to the question whether it had been properly brought here? *Quacumque via* it came, here we are bound, in conformity with the adjudications of this Court, to hold that the final order of the Supreme Court at General Term, confirming the report, is "final and conclusive," and not open to review in this Court. It is to be observed in this connection, that in this case, as in that of Canal and Walker streets, the only matter of controversy is in reference to the extent and apportionment of the burden imposed in carrying out the improvement. The Plaintiffs in Error complain that the burden imposed upon them as owners of property benefited has been improperly enchanced from two reasons:

1. By an excessive award of $3,000 to one Perkins, for a building standing on the lands taken for a street.

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2. By allowances of the clerk in the taxation of costs, which were illegal and improper.

The first objection, it is seen, being one of value of the building taken, is exclusively a question of fact, and is not reviewable in this Court; and the second more or less involves questions of fact, which cannot be inquired into on appeal to this Court. This Court has uniformly held that it has no power to review the taxation of costs or allowances made under the Code. As the objections of these Plaintiffs, therefore, present no question of law, it is obvious that this Court, for this reason alone, could not review the determination of the Supreme Court.

We have no doubt that the order made in this matter was appealable to the General Term of the Supreme Court, and that the order or judgment which the statute declares to be "final and conclusive," is that which the Supreme Court finally makes in the matter.

Such has been the uniform practice in matters of this kind, and they being special proceedings within the meaning of the Code, an appeal lies from the orders of the Special Term therein to the General Term. This Court has frequently declared such proceedings to be special proceedings, as designated by the Code, and recognized the practice of appeals therein from the Special to the General Term. It was the duty of the General Term, therefore, to have heard the appeal, and not to have dismissed it. If that order had been brought to this Court by appeal, we should have reversed it on this ground alone, upon the authority of the cases of The People v. New York Central Railroad Company (29 N. Y. 418), and Bank of Geneva *v.* Reynolds (33 N. Y. 160), and other cases, in which the rule laid down has been followed. But as already observed, a writ of error does not lie to bring up for review a decision of the Supreme Court in a special proceeding, as defined by the Code, and nothing remains for the Court to do in this case but to order the writ of error herein to be dismissed with costs.

All concurred.

Dismissed.

JOEL TIFFANY,
State Reporter.

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GEORGE A. CISCO, APPELLANT, *v.* MARSHALL O. ROBERTS, RESPONDENT.

Pilotage—Act of Congress of 1852—*Laws* 1853, *ch.* 467.

The Act of Congress of 1852 (Sess. Laws, p. 921), is applicable only to the class of pilots attached to particular vessels, and charged with the duty of navigating them on the voyage, and does not supersede the authority of the States to regulate pilotage at their own ports for the protection of general commerce.

A licensed pilot of the port of New York by the way of Sandy Hook, is entitled to 'off-shore pilotage," having offered his services at a distance from port entitling him thereto.

The appeal was from a judgment of the General Term of the Superior Court of the City of New York, in favor of Defendant, upon a verdict subject to the opinion of the Court.

The action was brought by the Plaintiff, as a licensed pilot for the port of New York by the way of Sandy Hook, under the existing pilotage laws of this State, to recover the sum of $57.60, due as pilotage of the Defendant's steamer, Empire City, into the port of New York, the Plaintiff having offered his services to pilot the vessel into port, and having been refused, and he being the first pilot so offering service.

He claimed "off-shore" pilotage, having offered his services at a distance from port entitling him thereto.

The Plaintiff was a pilot for the port of New York by the way of Sandy Hook, duly licensed by the Board of Commissioners of Pilots, created by the act of the legislature, of June 28, 1853, "to provide for the licensing and government of the pilots, and regulating pilotage of the port of New York." (See Pilotage Act, June 28, 1853, chap. 467, p. 921; Amendatory Act, April 11, 1854, Laws 1854, chap. 196, p. 459; Amendatory Act, April 4, 1857, Laws 1857, chap. 243, p. 500.) Sec. 13 of this act establishes the rates of pilotage, and provides for off-shore pilotage, as follows:

Pilotage—Acts of Congress—Construction. 45 *N. Y.* 449; 60 *N. Y.* 452; 10 *Abb. N. S.* 146; 4 *Daly,* 474.

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"When any ship or vessel, bound to the port of New York, and boarded by any pilot appointed by this board, at such distance to the southward or eastward of Sandy Hook lighthouse as that said lighthouse could not be seen from the deck of such ship or vessel in the daytime, and in fair weather, the addition of one-fourth to the rates of pilotage hereinbefore mentioned shall be allowed to such pilot."

Sec. 15 provides that the rates of pilotage for any intermediate distance shall be determined by the Board of Commissioners of Pilots.

Sec. 17 makes the pilotage payable by the master, owner, &c., of the vessel.

Sec. 29 provides that "all vessels sailing under register, bound to or from the port of New York by the way of Sandy Hook, shall take a licensed pilot; or, in case of refusal to take such pilot, the master shall himself, or the owner or consignee shall pay the said pilotage, as if one had been employed, and such pilotage shall be paid to the pilot first speaking or offering his services as pilot to such vessel" (§ 29, as amended, Laws 1857, chap. 243, p. 500).

Sec. 12 empowers the Board of Commissioners of Pilots "to make, promulgate, and enforce new rules or regulations, not inconsistent with the laws of this State or of the United States, which shall be binding and effectual upon all pilots licensed by them, and upon all parties employing such pilots."

Under the above provisions, the Board of Commissioners of Pilots made and promulgated rules and regulations, among which are stringent rules requiring pilots, under heavy penalties, to perform their duties in boarding and piloting vessels; and they also provided as follows:

18. "*The Pilotage ground of the port of New York* shall be deemed to be west of a line drawn in the shortest direction from Fire Island Light, to that of Barnegat Light, which line shall run S. W. ¼ S., and N. E. ¼ N., and west of that line vessels subject to pilotage must take the first pilot offering his service, or pay the pilotage."

On the 28th of December, 1857, the Plaintiff, in the dis-

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charge of his duty as pilot, was cruizing on the pilotage ground, and, in the afternoon of that day, hailed the steamer *Empire City,* of which the Defendant is owner, bound for the port of New York, on a voyage from Aspinwall, and offered his services to pilot her into port. He was the first pilot speaking her or offering his services. The steamer refused to take him, and proceeded on her course; and after having been spoken by the Plaintiff, and before reaching the port of New York, took on board as pilot, John Maginn, a pilot also duly licensed by the Board of Commissioners of Pilots, and who held, *besides, a license as steamer pilot, under the Act of Congress of August* 30, 1852, entitled, "An Act to provide greater security for the lives of passengers on board of vessels propelled in whole or in part by steam." John Maginn piloted the vessel into the port of New York.

The Plaintiff claimed that the pilotage of the vessel should be paid to him under §§ 13 and 29 of the pilotage act, and rule 18 of the Board of Commissioners of Pilots. The Defendant refused payment, claiming that the provisions of the State Law do not apply to steamers since the passage of the Act of Congress of 1852, and that the taking of a pilot licensed by the board was a sufficient compliance with the law. The Defendant also claimed that the State pilotage laws of New York are repugnant to the Constitution of the United States.

The pilotage allowed by the New York pilot law, for piloting the steamer into port, amounted, with interest, to $66.66, provided off-shore pilotage is allowed under § 13 of the act. The pilotage at the ordinary rate amounted to $50.

The above facts appeared at the trial before Mr. Justice Hoffman and a jury; and there being no disputed question of fact, the jury, under the direction of the Court, rendered a verdict for the Plaintiff, for the full amount of the off-shore pilotage, $66.66, subject to the opinion of the Court at General Term, with liberty to reduce the amount to $50, if the Plaintiff was not entitled to off-shore pilotage. Judgment was suspended, and the Court, at General Term, set aside the verdict, and ordered judgment for the Defendant.

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The Plaintiff appealed to this Court.

William Allen Butler for Appellant.

Gilbert Dean for Respondent.

PORTER, J.—The Superior Court rendered judgment for the Defendant, on the ground that our State laws for the regulation of port pilotage, so far as they apply to vessels propelled by steam, are in conflict with the Acts of Congress (Sess. Laws, 1853, 921; id. 1854, 459; id. 1857, 500; 1 U. S. Statutes at Large, 54; 5 id. 153; 10 id. 61).

The validity of our legislature on this subject, except so far as it may have been affected by the statute last cited, which was enacted in 1852, had been settled by a previous decision of the ultimate federal tribunal (Cooley v. Portwardens of Philadelphia, 12 Howard's U. S. R. 299). Since the present cause was decided in the Court below, the Supreme Court of the United States has adjudged that the Act of 1852 is applicable only to the class of pilots attached to particular vessels, and charged with the duty of navigating them on the voyage; and that it does not supersede the authority of the States to regulate pilotage at their own ports, for the protection of general commerce (Steamship Co. *v.* Joliffe, 2 Wallace, 450, 461, 462; Gilman *v.* Philadelphia, 3 Wallace, 731). It follows that, upon the facts proved, the Plaintiff was entitled to judgment.

It is unnecessary to determine the purpose and effect of the Acts of 1866, to which we have been referred, as the correctness of the decision under review depends on the antecedent state of the law. No subsequent congressional legislation would justify us in upholding a judgment confessedly erroneous, or in denying the right acquired by the Plaintiff under the authority of State laws, the validity of which has been sustained in the federal courts.

The claim that the Plaintiff is not entitled to off-shore pilotage rests upon a misapprehension of the limits of governmental authority in a maritime state or nation. It is not an issue as to the relative boundaries of State and Federal jurisdiction; for,

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in this respect, all that belongs to either is confessedly vested in the States in the absence of Federal legislation. The proposition of the Defendant involves a denial to either jurisdiction of the power claimed by every maritime nation, to exercise such rights on the neighboring seas—the common domain of all—as are essential to the protection of its own territorial dominion. We entertain no doubt of the existence of this power. The regulations of port pilotage stand, substantially, on the same footing with our quarantine laws. It is the right and the duty of the State, by appropriate legislation, to guard the public health and the security of general commerce, and to provide against the dangers to which every maritime people are exposed, by intercepting and averting them on the sea, without the bounds of exclusive territorial dominion (Gilman *v.* Philadelphia, 3 Wallace, 726, 730).

It is urged that such a power is subject to abuse; but this is no argument against its existence. The owners of every registered vessel leaving or entering our ports, must be content to acquiesce in our regulations for the security of general commerce; and it is no cause of just complaint that, in common with other maritime states, we exact reasonable compensation for services tendered by our pilots, those hardy sentinels of the sea, whom we encourage to encounter its severest hazards for the protection of property and life against the perils of an ocean cost.

The judgment of the Superior Court should be reversed, and judgment should be directed for the Plaintiff for $66.66, with interest and costs.

Judgment accordingly, all the judges concurring except GROVER, J., who was for affirmance.

JOEL TIFFANY,
State Reporter.

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THE COMMERCIAL BANK OF CLYDE, APPELLANT, *v.* THE MARINE BANK, RESPONDENT.

Receiver of Note for collection, though drawn against, not Purchaser for Value.

A banker, receiving from another notes for collection, obtains no better title to them or their proceeds than the remitting bank had, unless such collecting bank becomes a purchaser for value without notice of any defect in title.

Merely having a balance against the remitting bank, for which it had refrained from drawing, according to custom between such banks, relying upon such collection to balance the same, does not constitute the collecting bank a purchaser for value.

PARKER, J.—The Plaintiff is a corporation doing business at Clyde, in this State, and the Defendant is also a corporation doing business at Milwaukee, Wisconsin.

In April, 1857, Miller, Powell & Co. drew a draft on one Crocker, of Milwaukee, for $411.96, payable at sixty days, to the order of the Plaintiff, and delivered if for value to the Plaintiff. The Plaintiff endorsed and sent said draft to John R. Lee & Co., who were bankers at Buffalo, for collection, and on the 11th of April, Lee & Co. endorsed and sent it to the Defendant for collection.

On the 14th of May, 1857, Lee & Co. failed, and have ever since been insolvent.

The Defendant and Lee & Co. had each been, from about the 1st of April, 1856, to the 14th of May, 1857, the commercial and banking correspondents and agents of the other, and during that time had done business, each for the other, in the collection of drafts and commercial paper and otherwise. It was their usage and custom to receive and collect drafts and notes, and to credit, each to the other, the proceeds of such drafts and notes when collected, deducting therefrom the charges and expenses of collection. Accounts current were exchanged from

Banking—Receiving note for collection—Bona fide holder. 47 *N. Y.* 442; 116 *N. Y.* 499 (27 *St. Rep.* 670); 12 *Abb. N. S.* 426; 43 *How. Pr* 425; 34 *Super. Ct.* 388.

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time to time between them, and settlements made in accordance with such custom and usuage.

The draft in question was received by the Defendant on the 13th, and accepted by Crocker on the 14th of April, 1857.

Between the 14th of April and the 14th of May the Defendant, in the usual course of business, sent to Lee & Co., for collection, a certificate of deposit, issued by the International Bank of Buffalo, for $200, and a check drawn on said bank for $63.-25, both of which were collected by Lee & Co., and placed to the credit of Defendant; and they also collected between those dates a draft, which had in like manner been previously sent them for collection, for $175, which was also placed to the Defendant's credit. And between those dates the Defendant had collected and placed to the credit of Lee & Co. paper forwarded by them, in the usual course of business, for collection, to the amount of $200.

On the 3d day of June, 1857, the Defendant collected the said Crocker draft of the drawer, and credited the amount of such collection, less one per cent. charges (being $407.85), to Lee & Co. On the day before the payment of the draft, Lee & Co. were indebted to the Defendants in the sum of $743.70, leaving a balance, after deducting the proceeds of the draft, of $65.85. On the 9th of June Defendant collected a draft—which it had received from Lee & Co. for collection, as usual—the net proceeds of which, amounting to $67.47, after paying a portion thereof which was claimed by a third party, was placed to the credit of Lee & Co. On this latter day the Plaintiff gave Defendant notice of its claim to, and demanded payment of, the proceeds of the Crocker draft, and Defendant refused to pay the proceeds, or any part thereof, to the Plaintiff.

Evidence was given tending to show that, after the middle of March, the Defendant did not intend to allow much balance in the hands of Lee & Co., beyond what paper Defendant had from them about to mature, though, both before and after April 14th, paper was sent to them in order to supply a fund on which Defendant might draw for such small amounts as were occasionally called from Buffalo; also that paper was sent and the

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faith of the Crocker draft (which Defendant believed to belong prior balance allowed to remain, after the 14th of April, on the to Lee & Co.) and the other paper, and for the other reason above stated.

Upon the trial the Plaintiff asked the Court to charge the jury that, unless the Defendant gave Lee & Co. some new credit, or made advances, or parted with some value, on the credit of the Crocker draft, the Plaintiff was entitled to recover, which was refused. And the jury were instructed, that if the Defendant had transmitted any paper to Lee & Co. between the 14th of April and the 14th of May, on the faith of the Crocker draft, *or* if it delayed drawing the amount due it, by reason of having this draft, the Plaintiff was not entitled to recover; and that upon the evidence the Defendant was entitled to a verdict: and thereupon the Court directed a verdict for the Defendant.

Without reference to the question whether this judgment could stand upon the decisions of the Supreme Court of the United States, it is clear that it is not supported by the decisions of the Courts of this State.

It may be remarked that it is not so certain that the Defendant transmitted any paper to Lee & Co. for collection, on the credit of the draft in question, as to authorize the Court to assume it as a fact against the consent of the Plaintiff. But there is no pretence that paper to the whole amount of the proceeds of the draft was so sent; and even if the fact were admitted that the paper claimed to have been so sent was sent upon the credit of the draft; and if, as matter of law, it be admitted that Defendant had the right to retain, from the proceeds, an amount equal to the amount of paper so sent and collected, still the Plaintiff was entitled to recover the difference between the amount of the proceeds of the draft and the amount of paper so sent and collected. Under the decisions of this Court, the Defendant could not hold any portion of such proceeds to satisfy balances which it had suffered to lie in the hands of Lee & Co. on the credit of the draft.

This was very distinctly held in McBride *v.* The Farmers' Bank (26 N. Y. R. 450). The doctrine of that case is, that a

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bank receiving from another notes for collection, obtains no better title to them, or their proceeds, than the remitting bank had, unless it becomes a purchaser for value without notice of any defect of title; and that it is not a purchaser for value, by reason of its having a balance against the remitting bank for which it had refrained from drawing, in reliance upon a course of dealings between the banks to collect notes for each other, each keeping an open account of such collections, treating all the paper sent for collection as the property of the other, and drawing upon the proceeds for balances at pleasure.

It is to be observed that the course of dealings between Lee & Co. and the Defendant did not authorize either to draw upon the other for the amounts of the paper sent, until collected; the proceeds, after deducting the charges for collection, were alone credited, and no notes or drafts ever entered into their accounts until collected. There is, then, no ground for saying that the draft in question ever belonged to the Defendant. It was said in McBride *v.* The Farmers' Bank, "According to the decisions of the Courts of this State, Paul & Pritchard could have set up any defence to their notes in the hands of the Defendant that existed in their favor as against the Canal Bank, or the Farmers' and Mechanics' Bank; and the Defendants had no title to the notes that enables them to retain the money they received thereon as against the true owner."

Precisely so in this case. Crocker could have set up any de fence to the draft in the hands of Defendant that existed in his favor as aginst Lee & Co. or the Plaintiffs, so that the Defendant had no title to the draft that enables it to retain the money it received thereon against the true owner. Even as between the Defendant and Lee & Co., no title to the draft ever passed to the Defendant. If it had not been paid, and had gone to protest, there is nothing in the case which would have entitled the Defendant to maintain an action upon it against Lee & Co.

If the Defendant had been at liberty, in pursuance of the general arrangement between it and Lee & Co., to credit the draft on receiving it, and had done so, to form a fund upon which Lee & Co. were entitled to draw immediately, as was the

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case in Clark *v.* The Merchants' Bank (2 Coms. 380), then the Defendant might, as against Lee & Co., have claimed ownership of the draft and of its proceeds. In that case this distinction is made the criterion. The Court say: "The material question, as stated by the Court below, is whether the bill in question was transmitted [by the Plaintiffs who were the owners] to Smith & Co. [their business correspondents] for collection, merely, or was to be credited to the Plaintiffs when received by the former, whether collected or not." The Court below had held that it was not, by the course of dealings between the parties, to be credited until collected, while this Court held that the proper inference from the facts proved was, that it was to be credited when received. "The error of the learned judge, I apprehend," says Judge Gardiner, "consists in the assumption that nothing was credited to Clark & Co. [the Plaintiffs], in the course of business, until collected. This inference is opposed to the testimony of the only witnesses who speak as to the nature of the business and mode of transacting it, and to instructions of the Plaintiffs in the letter of the 15th of May." And it was because of that error that the judgment of the Court below, which gave the proceeds of the bill to the Plaintiff, was held erroneous and reversed.

The case of Scott *v.* The Ocean Bank (23 N. Y. R. 289) is based upon the same distinction. These cases, I think, warrant the conclusion that the Defendant, having acquired no title to the draft itself, cannot claim to hold, as against the true owner, any portion of the proceeds.

In regard to the case at bar, however, it is sufficient, and all that I am authorized by the Court to say is, that the Court below erred in assuming that Defendant had transmitted any paper to Lee & Co. on the credit of the draft, and in holding that if Defendant had delayed drawing the amount due it by reason of having this draft, the Plaintiff was not entitled to recover.

The judgment of the Supreme Court must therefore be reversed, and a new trial ordered.

All concur in result.

JOEL TIFFANY,
State Reporter.

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SAMUEL H. SMITH, RESPONDENT, v. HENRY L. BABCOCK AND OTHERS, APPELLANTS.

Evidence—Damages to Real Estate—Title.

In an action by the vendor against the vendee of certain real estate, for domages done to the freehold while the vendee was in possession under a contract of purchase, it is competent for the vendee to allege and prove that the vendor never had any estate in the land, or in the freehold alleged to have been injured.

THIS was an action to recover damages for the removal of a building from certain premises in Caton, Steuben County, which premises had been sold by executory contract, by the Plaintiff, to one Catharine Herrick, and had afterward come back into his possession by reason of the non-performance of the contract by the said Catharine Herrick. The facts are stated in the opinion of the Court.

G. B. Bradley for the Appellants.
George T. Spencer for the Respondent.

HUNT, J.—This is a special action for injury to the Plaintiff's interest in the property described in the complaint. The Plaintiff sold the property to Catharine Herrick, by a written contract, in which (a certain cash payment being made) it was agreed that the payments stipulated were to be made at a future day, at which time the deed was to be executed by the Plaintiff, and in the mean time the purchaser was entitled to possession. While thus in possession, and before the arrival of the stipulated time of payment, the injury complained of was committed. The Plaintiff alleged and proved that a building erected upon said premises was injured, and a portion of the same entirely removed from the premises. Evidence was given at the trial to show that the injury was committed by the direction of Mr. and Mrs. Herrick, with the assistance of the Defendants. After hearing the evidence upon both sides, the

Contract—Sale of land—Implied covenant of title. 38 *Super. Ct.* 451; 46 *Super. Ct.* 318; 48 *Super. Ct.* 192.

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judge holding the circuit declined to submit the case to the jury on the question of liability, but charged the jury as matter of law that each of the Defendants was liable, and that the only question for the jury to pass upon was the amount of damages to which the Plaintiff was entitled. During the trial the Defendants offered to prove "that the Plaintiff had no title to the premises in question at the time of making the contract with Mrs. Herrick, or at any other time afterward; and that he did not then have, and has not at any other time had, any means, power, or authority of procuring a title thereto." This evidence was excluded, and the Defendants excepted. The jury rendered a verdict for the Plaintiff, and upon appeal to the General Term of the seventh district, the Supreme Court affirmed the judgment rendered thereon. The Defendants now appeal to this court.

The rejection of this evidence was sustained in the court below, on the ground that Mrs. Herrick, having recognized the Plaintiff's title by her contract to purchase, was estopped to deny it, and that the acts of the Defendants having been under her direction, they were estopped also. The court also say in this connection, that the offer of the Defendants was not to show that they or either of them had title to the premises, but that the Plaintiff had none.

A party in possession of premises under a lease, or under a contract of purchase, is certainly estopped for some purposes from denying the title of his vendor or lessor. This is upon the principle that he shall not use the possession acquired from an apparent owner, to the injury of such owner.

Whenever, therefore, the tenant surrenders possession to the lessor, or his term expires, the rule no longer applies; but he is at liberty to assert a right without the consent of the lessor (Child *v.* Chappell, 5 Seld. 246). Having given up the advantage of the position received under a claim of title, he is no longer subject to its disabilities (Jackson *v.* Spear, 7 Wend. 401). This rule of estoppel, it is to be observed, does not apply when the action does not involve the right of possession. Thus while a tenant cannot deny his landlord's title in an action to

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recover possession, or for the rent, when the lessee has actually enjoyed the premises, yet he may do so when he has not actually occupied the premises (Vernam *v.* Smith 15 N. Y. 327; authority cited, pp. 329, 330). And in an action to recover the amount agreed to be paid as a contract of purchase, the purchaser may defend on the ground that the seller has and *can give no* title (Burwell *v.* Jackson, 5 Seld. 535; 4 Coms. 396; 11 Vesey, 337; 18 Vesey, 508; 9 Price, 488). In the one case, it would be most unreasonable for a lessee, who has had the full use and benefit of his lease, to say that his lessor had no title. The implied covenant for possession is a sufficient consideration; and whether he had title, or had not, the lessee has received the expected benefit, and should pay the promised rent. In the other case where A, without title, agrees to sell certain premises to B, who, supposing that a title can be given, agrees to pay the purchase-money, it would be unreasonable to compel B to pay the promised sum, when it became clear that A could not perform on his part by giving title. The distinction is manifest, and is recognized by the authorities cited above.

In the case before us, it will be borne in mind that the action is not for an injury to the possession. The right of possession was in Mrs. Herrick exclusively at the time of the transaction in question, and such action would be hers exclusively. It is for an injury to the reversion, for an injury to the Plaintiff's interest in the property itself; and at the time it was brought, Mrs. Herrick had abandoned the possession, and the plaintiff had resumed it. Upon the principles stated, it is not clear that Mrs. Herrick herself would be estopped from questioning the ownership. She had yielded what she had received from the Plaintiff, the possession, and both parties stood remitted to their original rights. If she had despoiled the property, she was liable in damages to the owner, and to no one else; and a recovery by a pretended vendor would not protect her against the claims of the real owner.

But the Defendants in this action had made no contract whatever with the Plaintiff. At the request of Mrs. Herrick, as is assumed, they had injured the house upon the premises. They

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were doubtless responsible for this act, and could not shield themselves under the direction of Mrs. Herrick, except so far as her interest was affected. But they were not responsible further or otherwise than they would have been if they had committed the injury upon their own volition, and without the intereference of Mrs. Herrick. A trespass is not aggravated by the circumstance that it is committed at the instance of one having no right to interfere. The idea of privies is inapplicable to such a case. The Defendants have no rights in the premises under any one, and claim none. They are strangers legally and technically (Campbell v. Hall, 16 N. Y. R. 578, and cases cited). The Defendants were therefore responsible to the possessor of the property for injury to the possession, and to the owner of the fee if the injury affected the reversion. The direction of the actual possessor was a defence to any claim to be interposed by her, and they remained responsible to the owner of the reversion alone. We are to assume the offer to be capable of proof to its full extent; and if we suppose that the Plaintiff, at the time of the injury, had no title to the property, that he has had none since, and no power or authority to procure it, how are the Defendants to be protected from the claim of the real owner when he shall appear? A recovery in favor of a pretender will not protect them. The right of the actual owner would not be affected thereby.

The case of Dewey v. Osborn (4 Cowan, 329) is cited by the Respondent, and in some of its features it is very like the present case. The Plaintiff there recovered on ejectment against Barker; and intermediate the judgment and the issuing of a *habeas facias,* the Defendant in that suit, with the aid of his neighbors, of whom Osborn was one, removed a building from the premises on to an adjoining lot of Barker's. In an action to recover damages for such removal, it was held that the record of recovery in the suit against Barker was competent evidence in the latter suit. The Defendant Osborn did, as the report shows, attack the actual title of the Plaintiff, but failed in shaking it, and the Court sustained the recovery by the Plaintiff.

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There is also a class of cases, of which Whitney *v.* Lewis (21 Wend. 131) is an example, in which the covenant for quiet enjoyment is a deed was held to be a sufficient consideration from the agreement to pay; and until the Defendant was disturbed in his possession, he could not set up the want of title as a defence to his bond for the purchase-money. This is like the case of possession under a lease already discussed, and is expressly distinguished in Burwell *v.* Jackson, *supra,* from the case of an executory contract to convey.

I think there was error in excluding this evidence; and upon that ground, without examining the further questions in the case, there should be a new trial.

GROVER, J.—The proof offered by Defendants, that Plaintiff had not, nor ever had, any title to the lot in question, should have been received. It was excluded upon the ground that Mrs. Herrick, having acquired possession under a contract of purchase from the Plaintiff, was estopped from disputing his title; and that Defendants, in moving the building, having acted under authority derived from her, the estoppel was equally applicable to them. The latter conclusion I think correct. The inquiry is whether, if Mrs. Herrick had been made a Defendant in this action, she would have been estopped. Had the action been to recover possession of the premises from her, or from any one who had obtained possession from her, it is clear that the Plaintiff's title could not have been questioned upon the trial. The law will not permit a party acquiring possession of land from another to retain such possession by setting up an adverse title. Such an attempt is regarded as fraudulent, and the law defeats the attempted fraud by requiring a restoration of possession before it will permit the party to question the title. But this is the extent of the rule. When the possession has been surrendered up to the one from whom it was obtained, the disability is removed. The party so surrendering may at once bring an action to recover the land, and maintain it upon any valid title he can show, although acquired prior to his entry under his adversary. In the present case the action was to re-

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cover the value of a building removed from the premises, not to recover possession. If the Plaintiff succeeded, his recovery would be no bar to an action brought by the real owner. It might well be that if the Defendants were estopped from disputing the Plaintiff's title, and he recovered upon that ground, a second recovery for the same cause would be had against them by the real owner. Indeed, had such recovery actually been had, it would not, under the ruling of the court, have constituted any defence against the Plaintiff, although based upon an unquestioned title which the Defendants were prepared to show. Thus the law would compel the Defendants to pay twice for one unlawful act. Such a result contravenes the maxim, that no one shall be twice vexed for the same cause. The estoppel only applies to actions and proceedings to recover possession, or to enforce rights conferred by the contract under which possession was taken. This was not such a case, and therefore the estoppel does not apply. Mrs. Herrick in this action, if a Defendant, might have shown a want of title in the Plaintiff.

This proof showed only a primâ facie title against the Defendants, which they were at liberty to defeat if they could.

I also think the court erred in not permitting the Defendants, Henry L. and Julian Babcock, to go to the jury upon the question of their liability for the trespass. The lending of his horses by Henry to Herrick, although he knew he wanted them to use in moving the building, would not make him liable for its removal, any more than the loan of an axe that the lender knew was wanted by the borrower to be used in committing a trespass upon his neighbor's land would be liable for such trespass. According to the evidence on his part, this was all he did. Julian, according to his testimony, did nothing. The evidence of the Plaintiff, if true, showed both liable. But as the evidence upon another trial may vary, I shall not discuss this part of the case any further. Upon the first ground the judgment must be reversed as to all the Defendants, and a new trial ordered.

All concur as to the result.

Reversed.

JOEL TIFFANY,
State Reporter.

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SERENA FERRIS, RESPONDENT, v. THE UNION FERRY COMPANY, APPELLANTS.

Negligence—Ferry Company—Dropping Chain before securing Boat.

The dropping of the chain guarding the passage way on a ferry-boat, before the boat is properly secured to the bridge, thereby signifying to the passengers that everything is ready for them to pass off, is such an act of negligence on the part of the company, as to render them liable for damages occasioned by failure to have the boat properly secured to the bridge.

APPEAL from a judgment of the Supreme Court, rendered at General Term in the First District, affirming order denying motion for new trial; and a judgment entered upon the verdict of a jury, on a trial at Circuit, before Hon. Henry Hogeboom, Justice of the Supreme Court.

The Plaintiff was a passenger from Brooklyn to New York on one of the Defendants' ferry-boats, and on the arrival of the boat at the slip in New York, her foot fell into an opening between the boat and the floating bridge at which she was to land, whereby her leg was jammed, causing the injury on account of which this action was brought.

A motion for nonsuit was made at the close of the Plaintiff's case, and again when the Defendants rested, both of which were denied.

The jury found a verdict for the Plaintiff for $400. All of the other important facts in the case are sufficiently disclosed in the opinion.

SCRUGHAM, J.—We are only to determine whether the learned justice who presided at the trial erred in refusing to dismiss the complaint when the Plaintiff closed his case, or in again so refusing when all of the testimony had been adduced on both sides.

Chains are fastened across the ferry-boats of the Defendants when they leave their slips, to prevent passengers from leaving

Carriers—Approaches—Condition—Negligence. 37 *N. Y.* 574; 42 *Misc.* 625 (87 *N. Y. Supp.* 610); 6 *Lans.* 78; 1 *Sweeny,* 515; 46 *St. Rep.* 326 (19 *N. Y. Supp.* 675).

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the boat before it is properly fastened to the floating dock or bridge to which it comes. Some of the men employed upon the boat guard these chains, to maintain them in position until they let them down to enable the passengers to leave the boat on its arrival. That part of the chain which crossed the passage way from the ladies' cabin of the boat on which the Plaintiff was injured, was let down on that occasion by one of these men before the Plaintiff attempted to pass from the boat to the bridge. If the Defendants were guilty of any negligence, it was in this act of their employé. It was not negligence, if so much of the easterly end of the boat as corresponded in position and width with the ladies' passage way was at that moment close up and fastened to the bridge; and if this was not the case, the dropping of the chain was negligence, for it was an intimation to the passengers that the junction of the boat with the bridge was, as to that passage way, perfect.

The conformation of the end of the boat and the bridge, as shown on the diagram which was used on the trial, and of which a copy appears in the case, shows that if the end of the boat and the bridge were in close contact over the whole width of the ladies' passage way (being a length of eight feet from the northerly end of the bridge), contact must have continued several feet further southerly. If, therefore, the place of the accident was on the ladies' passage way, as the Plaintiff testifies, or not more than a foot southerly of it, as stated by her witness, Mr. Dodge, the junction of the boat and bridge could not have been perfect over the whole width of the passage way at the time of the accident; and the dropping of the chain by the servant of the Defendants before that junction was secured, was negligence in the Defendants.

The Plaintiff was not bound to use more than ordinary care in leaving the boat. She did not attempt to go off, nor did she leave the ladies' cabin until she heard the chain drop. As it was dropped by one of the men in charge of it, she had a right to assume that the boat and bridge were, and would remain, perfectly joined over the whole width of the ladies' passage way, and over a space of more than a foot extending southerly from it; for the junction over the width of the passage way

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would naturally and necessarily effect the junction over the additional space. Therefore, in attempting to pass off from the boat outside of the ladies' passage way, but within one foot southerly of it, the Plaintiff was not negligent. She was passing off with other passengers, a considerable number being both before and behind her, and she had seen nearly half of all of the passengers who were on the boat leave it in safety before she fell. When the Plaintiff rested her case there was no circumstance in evidence showing any negligence on her part. It did not appear that she was looking in a direction different from that in which she was going, or that she was not observant of her steps, or that before she made the step the opening between the boat and the bridge existed. These circumstances were not necessarily inferable from the occurrence.

Only one corner of the boat was fastened to the bridge; the boat was otherwise loose, and floating in water which must have been still under agitation from the movement of the wheels and hull in approaching the dock. Under such circumstances, the effect in a slip of such slight swells as are usually caused by the wheels of steamboats would be to sway her to and from the bridge, so that at one moment a portion of her bow might adjoin the bridge, which at the next would be somewhat withdrawn from it. It is quite possible that, when the Plaintiff raised her foot to make the unfortunate step, the boat was at that point in contact with the dock; and that when the foot came down, the boat had receded sufficiently to cause the opening into which it fell. There is no evidence of this, but it is a hypothesis upon which the injury may be accounted for, without attributing it to negligence in the Plaintiff; and a presumption of negligence will not arise from the injury alone, if it can be accounted for on any other reasonable hypothesis (Holbrook v. The Utica and Schenectady Railroad Company, 2 Kernan, 236).

One of the Defendants' witnesses testified that he called out to the Plaintiff, "Madam, be cautious how you step;" but there is no evidence that this caution was heard by her, or by any other person; and the witnesses on the part of the Defendants located the point of the Plaintiff's fall as at, or a little southerly

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of, the centre of the bow of the boat. In this they were in direct conflict with the witnesses for the Plaintiff.

Thus, then, there was at the close of the whole testimony, and when the second motion for a dismissal of the complaint was made, conflicting evidence upon one of the most important points in the case, and therefore the judge properly refused to grant the motion.

The judgment should be affirmed.

DAVIES, CH.J.—The action was brought to recover damages sustained by the Plaintiff, caused by the negligent acts of the Defendants, in not properly securing a ferry-boat upon which the Plaintiff was a passenger, whereby, in passing off therefrom, she was injured. The only exception taken on the trial was to the refusal of the judge to nonsuit the Plaintiff.

The Plaintiff having closed her testimony, the Defendants' counsel moved for a nonsuit, on the ground that Defendants had not been guilty of negligence, and that the Plaintiff's negligence contributed to the injury. Under a charge to the jury which would seem to have been satisfactory to both parties, the jury found a verdict for the Plaintiff.

To arrive at this result, they must necessarily have found:

1. That the Defendants were guilty of negligence; and
2. That the Plaintiff was not guilty of any negligence which contributed to the injury.

The Supreme Court having refused to set aside the verdict on either of these points, we are to assume it was satisfactory to that tribunal. I entirely agree with the learned judge who heard the motion for a new trial, where he said that he was unable to discover the negligence of which the Defendants were guilty on the evidence in the case; or, if negligence may be imputed to the Defendants, why is it not equally chargeable upon the Plaintiff? Yet, as he refused to grant a new trial, and the Supreme Court, at General Term, have affirmed his decision, it seems to me, in a case like the present, and upon this testimony, it would be injudicious to disturb the judgment, and it should therefore be affirmed with costs.

All affirm. JOEL TIFFANY, State Reporter.

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JOSEPH BARTON v. THE CITY OF SYRACUSE.

Municipal Corporation—Liable for obstruction in its Sewers.

A municipal corporation is liable for damages sustained by a Plaintiff caused by obstruction occasioned to the flow of water in the public sewer, by reason of which the Plaintiff's premises became flooded by water thrown back through his, Plaintiff's drain.

Bockes, J.—This is an action in a case for negligence, in which the Defendant is charged with culpability in omitting to keep a sewer in proper repair, and in suffering it to become filled with dirt and rubbish, by reason of which the flow of the water was impeded, causing it to set back through the Plaintiff's drain into his cellar, to the injury of his property.

The referee, to whom the case was referred to hear and determine, directed judgment for the Plaintiff, which judgment was affirmed at General Term.

By the city charter the mayor and common council were authorized and directed to construct sewers through the city, and to keep them in repair.

They accepted and entered upon the performance of this

Drains and sewers—Overflow—Liability of municipality. 51 *N. Y.* 228; 58 *N. Y.* 393; 111 *N. Y.* 502 (19 *St. Rep.* 82); 166 *N. Y.* 107; 4 *Abb. App. Dec.* 571; 4 *Keyes,* 266; 4 *Hun,* 388; 78 *Hun,* 245 (60 *St. Rep.* 5; 28 *N. Y. Supp.* 827); 40 *App. Div.* 322 (57 *N. Y. Supp.* 969); 58 *App. Div.* 517 (69 *N. Y. Supp.* 362); 61 *App. Div.* 346 (70 *N. Y. Supp.* 527); 11 *Misc.* 553 (64 *St. Rep.* 452; 32 *N. Y. Supp.* 745); 33 *St. Rep.* 432 (11 *N. Y. Supp.* 306); 40 *St. Rep.* 700 (16 *N. Y. Supp.* 97).

Contributory negligence—Wrongful act of defendant 18 *App. Div.* 450 (46 *N. Y. Supp.* 160).

Municipality—Liability for negligence of officers. 46 *N. Y.* 196; 50 *N. Y.* 238; 66 *N. Y.* 297; 11 *Hun,* 597; 13 *Hun,* 294; 35 *App. Div.* 259 (54 *N. Y. Supp.* 802; 6 *Ann. Cas.* 349); 3 *T. & C.* 7; 6 *T. & C.* 636; 54 *Barb.* 178; 9 *Abb. N. S.* 55; 1 *Lans.* 87; 5 *Lans.* 349; 3 *Daly,* 67, 151.

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duty, and constructed sewers along such of the streets as were deemed appropriate, with a view to a favorable and healthful drainage.

The expenses were assessed upon the property benefited, as provided by the charter, and their supervision and control were properly assumed by the city government. Under this condition of authority and duty the municipal corporation were bound, through the proper officers, to a faithful and prudent exercise of power, and carelessness and negligence in that regard created a liability, which might be enforced by any one suffering damages therefrom.

So the law is firmly established that, in constructing sewers and in keeping them in repair, a municipal corporation act ministerially, and having the authority to do the act, is bound to the exercise of needful prudence, watchfulness, and care.

The authorities in support of these principles are too numerous and familiar to require particular comment (The Mayor *v.* Furze, 3 Hill, 612; Hutson *v.* The Mayor, &c., 9 N. Y. 163; The Rochester White Lead Co. *v.* The City of Rochester, 3 N. Y. 463; Conrad *v.* The Trustees of Ithaca, 16 N. Y. 158; Mills *v.* The City of Brooklyn, 32 N. Y. 489). It is insisted that the sewer, in this case, was constructed exclusively for surface drainage.

This, however, is obviously a mistaken assumption. The charter evidently contemplated all the usual advantages to result from a system of city sewerage, embracing alike the health and convenience of the inhabitants.

The system contemplates general drainage of all accumulations of water and soluble matter; not only the speedy discharge of such as would otherwise stagnate on the surface, or accumulate from percolation and other causes in cellars, but also the ready removal of impurities incident to populous localities, which necessarily collect in a greater or less degree in large tenements.

In this way a sewer becomes subservient to health and comfort, and is made common to all who own or occupy adjacent property; hence, the expense of its construction is charged on such property as a positive benefit.

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In this view it becomes the right of every one occupying premises along the line, under proper restrictions for general protection, to use it, by inserting a drain from his lot. In this case the city charter, or ordinances, recognizes and concedes the right thus to use it, as it imposes a penalty for digging to connect with a sewer without first serving notice of such intention (chap. 9, sec. 2). It seems, therefore, that the right of the Plaintiff to connect his drain with the public sewer is placed beyond possible question. But it is insisted that the privilege to drain into the public sewers was subject to certain conditions, which were not complied with by the Plaintiff; that he, in fact, violated an ordinance of the city in connecting his drain with the sewer, and incurred a penalty; hence he cannot recover in this action. It seems very plain that it was intended that permission to connect drains with the sewers should be obtained from the corporation, or from some of its officers. Sec. 6 of title 5 of the charter requires the city surveyor and engineer to keep a record of all sewers established by the common council. Sec. 13 makes it the duty of the supenintendent of the streets to supervise the building and repairing of sewers; and sec. 2 of chap. 9 of the ordinances and by-laws makes it a penal offence to tear up any pavement, street, or crosswalk, or to dig any hole or trench in any street, without permission from the common council or mayor, and further imposes a penalty for omitting to give notice to the clerk of the intention to dig, if for the purpose of connecting with a sewer, or water or gas-pipe, giving the location and name of the one, to the end that the clerk might keep a register of the same.

Sec. 131 provides that whenever permission is given in any case to lay any drain, or to dig, or take up any pavement or sidewalk, for the purpose of making or repairing any drain, &c., the same shall be done, unless otherwise specifically ordered by the common council, under the direction of the street superintendent, and any refusal or neglect to conform to his orders and directions was made penal.

By sec. 132 it is provided that no persons shall open or penetrate any common sewer for the purpose of making a drain therewith "without the consent of the street superintendent,

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or a member of the common council, under a penalty of five dollars for each and every offence."

Thus it is seen that consent was a prerequisite to the opening of a trench in the street, or to the opening or penetrating to a sewer for the purpose of making a drain therewith, and any violation of such duty was a penal offence.

These two were important and wholesome regulations. But who had the right to give the requisite consent? From sec. 2 of chap. 9 it is plain that permission from the common council or mayor would be a protection and sufficient authority; and it is also fairly inferable, from the provisions of sec. 132, that the street superintendent, or a member of the common council, might also give such consent.

These ordinances are not entirely harmonious, but I think may be so construed as to carry out this general purpose without absolute conflict. It was undoubtedly intended that no opening in the street or interferences with the sewers should be suffered except under the sanction and approval of the city authorities. This was essential to the enjoyment and protection of public rights. But notice of the intention, and permission from a competent source, met and answered all the exigencies of the case. The street superintendent could then, if necessary, assume the charge of, and direct the work. Now it is true that by sec. 2 of chap. 9 it is made a penal offence to excavate in the street, without permission from the common council or mayor, and by sec. 132 it is made penal to open or penetrate a sewer, for the purpose of connecting a drain therewith, without the consent of the street superintendent, or a member of the common council.

These ordinances should be read together, and, when so read and construed, they mean that permission to excavate or dig in the streets must be obtained from the common council or mayor; except that, when a person desires to open or penetrate a sewer for the purpose of connecting a drain therewith (which necessarily implies the breaking of the surface and digging), the consent of the street superintendent, or of a member of the common council, shall be sufficient authority so to do.

This, too, seems to have been the practical construction given

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these sections by all parties; for in most, if not in all cases, notice to, and permission by, the street superintendent was acted upon and accepted as sufficient. And it evidently was so for all practical purposes, as it devolved on the street superintendent to see that the streets were not unnecessarily obstructed, and that connection with sewers were properly made.

It seems, therefore, that the Plaintiff incurred no penalty—hence was guilty of no unlawful act—in opening or penetrating the sewer for the purpose of connecting his drain therewith, inasmuch as he had permission so to do from the superintendent of the streets.

But it is insisted that the Plaintiff was bound to give notice to the clerk of his intention to dig in the street for the purpose of connecting his drain with the sewer, and that he incurred a penalty for omitting so to do.

The act made wrongful by the latter clause of this section (sec. 2) is the neglect to serve the notice, the object of which was to enable the clerk to keep a register of the connection. The omission to give the notice did not make the connecting with the sewer unlawful. It therefore did not make the Plaintiff a wrong-doer in that regard.

The cases cited by the Appellant's counsel (7 Wend. 276; 14 J. R. 273; 1 Allen, 403; 10 Met. 363; 3 Allen, 407; 3 Denio, 226) are not applicable to this case.

It is also insisted that the recovery is erroneous because there was no proof of notice to the corporation of the needed repair before the injury complained of occurred. Such notice, however, was not necessary in this case. The injury here resulted from an omission of duty—a neglect to do an act which it was incumbent on the defendant to perform.

It differs from the case of Griffin v. The Mayor of New York (9 N. Y. 456), where the obstructions were placed in the street by third parties. The distinction is well marked by Judge Denio in the case cited.

Other objections to the recovery in this case are urged upon our consideration, but they were well answered in the opinion of Mr. Justice Allen in the Supreme Court (37 Barb. 292).

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The judgment should be affirmed.

All concur except PORTER, J., who, having been counsel, expressed no opinion.

Affirmed.

JOEL TIFFANY,
State Reporter.

THE BANK OF AUBURN, RESPONDENT, *v.* LEWIS PUTNAM, PRESIDENT, &C., IMPLEADED, &C., APPELLANT.

Negotiable Paper—Endorsement by Agent—What defence precluded.

Where the agents of the Defendants had been accustomed to endorse paper in the name of the Defendants, and to get the same discounted for their benefit, and had endorsed in their names, and procured to be discounted, the note in question, the Defendants will be precluded from setting up that such note being accommodation paper, their agent was not authorized to endorse the same. The Plaintiffs had a right to presume that it was regular business paper.

PARKER, J.—It is found as a fact in this case that Bliss, who endorsed the note in question in the name of the Defendants as their agent, had frequently before endorsed their business paper in the same manner, and procured it to be discounted by the Plaintiff, which endorsements had been recognized by the Defendants. It is also found that this note was discounted for the Defendants, upon their application, through their secretary, and the avails paid over to him, which the Defendants had and used in their business as commission dealers, in buying grain for the market, and that the Plaintiff had no notice that the note was occommodation paper.

Now, whether Bliss, the agent, had authority from the Defendants to endorse accommodation paper in their name, or whether this note was in fact endorsed for the accommodation of the maker or not, is quite immaterial; for the Plaintiff had the right to presume from the facts found, as above stated, that it was business paper such as it had been in the habit of discounting for the Defendants; and the Defendants are precluded from denying that it was such business paper (Bank of Genesee *v.* Patchin Bank, 3 Kern. 314; S. C., 19 N. Y. R. 312; Farm-

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ers' Bank v. Butchers' and Drovers' Bank, 16 N. Y. R. 125).

The notice of protest was sent to Bliss, the agent, and received by him. This, I think, was sufficient. In the first place, Bliss was the agent to endorse this paper for the Defendants. In Firth v. Thrush (8 Barn. & Cress. 387), Lord Tenterdon expressed the opinion that authority to endorse negotiable paper carried with it authority to receive notice of its dishonor. But it is not now necessary to examine that question, for here the agent was authorized, not only to endorse this paper, but, as appears from the findings, we must conclude was the general agent of the Defendants to endorse and attend to such paper for them. There is a distinct finding of fact that he was their agent for what is not stated, but manifestly not merely to endorse their paper.

There is no evidence from which we may infer that a general agency was meant. Now, if he was the general agent of this joint-stock company, in reference to the endorsing and taking care of their business paper, no doubt notice to him of the dishonor of this note was notice to the Defendants (sec. 1, Parsons on Notes and Bills, 499, and cases there cited; also id. 502-3).

But for another reason that must be deemed the law of this case. There is in the findings by the judge before whom the cause was tried the following conclusion of law:—"The objection, that the notice of non-payment was not properly served on the Defendants, because sent to the agent Bliss, is not good. It yas the proper way to serve the notice, especially if Bliss was agent of the company, and authorized to endorse." To this there is no exception, and, consequently, it is not open to review (Code, § 268; Magie v. Baker, 14 N. Y. R. 435; Weed v. The New York and Harlem Railroad Company, 29 N. Y. R. 616).

The judgment should therefore be affirmed.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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CHARLES WALL, ET AL., APPELLANTS, v. THE HOME INSURANCE COMPANY, RESPONDENT.

Policy of Insurance—Non-payment of Note for premium—When paid.

A condition in a policy that if the note given for the premium is not paid at maturity, the policy shall be void, is a valid and binding one, and the note being dishonorded, the policy thereby becomes void.

J. M. Van Cott for Appellants.

W. A. Butler for Respondent.

HUNT, J.—The defence in this case arises upon the following clause of the policy: "In case the note or obligation given for the premium herefor, be not paid at maturity, the full amount of premium shall be considered as earned, and this policy become void, while said note or obligation remains overdue and unpaid." The premium to be paid by the assured was not required to be paid in cash. Instead thereof it was agreed that the assured could give his note therefor, payable at the expiration of four months. This was a waiver of prepayment, which the parties had a perfect right to make. They added, however, to this waiver, a condition, that if the note was not paid at maturity, the full amount of the premium should be considered as earned. I understand this to mean, that the duty of indemnity on the part of the insurers should thereupon cease; that they had earned all the premium agreed to be paid, and as there was no further compensation to be paid by the assured, no further indemnity from the insurers was expected. The condition further provided, that while the note remained overdue and unpaid, the policy should become void. This was a reiteration and enlargement of the same idea.

This note matured on the 20th of September, was protested and remained unpaid. On the 9th of October the vessel insured was lost. On the 20th of October the Plaintiff, being advised of the loss, of which the Defendants were ignorant, offered to pay the amount of the note, which offer was declined,

Insurance—Conditions—Premium note—Waiver of payment. 6 *Abb. N. C.* 462; 67 *Barb.* 590.

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and the note yet remains unpaid. There was thus a clear breach of a valid condition, and by the terms of the contract the obligation of the insurer was at an end, before and at the time of the occurrence of the loss; the note, however, remaining of full force and effect (Beadle *v.* Chenango County M. Ins. Co., 3 Hill, 161; Neely *v.* Onondaga M. Ins. Co., 7 Hill, 49; Smith *v.* Saratoga M. Ins. Co., 3 Hill, 508).

On the trial the Plaintiff claimed that this condition of the policy had been waived by the Defendants, through the action of their agent, D. C. Dobbins, and asked to be allowed to go to the jury on that question. The Court held that there was no evidence upon the point for the jury, and nonsuited the Plaintiff. The evidence of Elijah K. Bruce is relied upon to sustain the claim of waiver. He testified as follows: "I saw him (Dobbins) at the corner of the Merchants' Exchange; he said the note could lie over a few days without any prejudice to the policy; not exactly those words; he said the note would be all right to lie over; he said his company would as soon have the interest as the money. He had said that to me before, in other cases. I said to him, the endorsers are perfectly good. He said he knew that." On his cross-examination, he says this was within a day or two of the maturity of the note, and in answer to the question, "Give the jury the precise language," he says, "I told him I wanted him to wait till the Zenobia came home for payment of that note; I referred to the note; I told him the note was perfectly good; he said he knew that." "Have you stated all that was said?" "As nearly as I can recollect." William Moore was examined on commission, and testified that, a few days after the maturity of the note, he had a conversation with Mr. Dobbins in relation to it. "State what he said about this note." "I believe I introduced the subject by asking why he did not renew the note for Bruce, as the endorser was good. He said it was good enough the way it was, the 'way' or 'shape,' or some such expression. That is about all the conversation we had in relation to it." "Can you state whether he used the expression: 'It is just as well for everybody as it is,' or any equivalent expression?" "It seems to me he did

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make use of that expression; come to think it over, I feel pretty confident he made use of that expression." On his cross-examination he says: "I asked him why he did not extend it, as the parties were perfectly good who endorsed it." "When you stated, on your direct examination, that he said it was good enough, the 'way' or 'shape' it was, did you mean to say that he used those words?" "Yes, sir." "Have you a present recollection of the precise language of Mr. Dobbins?" "That is as near as I can remember it." Upon this evidence would the jury have been justified in finding an agreement by Dobbins, that, notwithstanding the dishonor of the note, the policy should be and continue an available security? Upon a motion for nonsuit the evidence is not to be weighed or balanced. The Plaintiff is entitled to an affirmative answer upon any question of weight or degree. There must, however, be legal evidence in support of the claim. Giving the full benefit of all question and doubt, I can see no evidence here to justify the Plaintiffs' claim that Dobbins agreed that the policy should continue in force. The expression, as given by Bruce, that he said the note could lie over a few days, without any prejudice to the policy, was immediately corrected by him, when he puts the answer in language which applies to the note only, and not to the policy. The conclusion, and the only conclusion to be drawn from this evidence is, that Dobbins would not press for payment of the note, that it might lie over for a short time. It contains no reference to continuing or reviving a liability on the policy.

If I am right in this view of the testimony, it is not necessary to inquire into the authority of Dobbins. I think the judgment is right and should be affirmed.

Concurring, WRIGHT, SCRUGHAM, DAVIES, and BOCKES.

GROVER, J. (dissenting)—THIS action was brought upon a marine policy, issued by the Defendant upon the schooner Zenobia, for four thousand dollars, covering certain perils of lake navigation, &c.

A note at four months was given by the owner, and endorsed by Plaintiffs—to whom the loss was made payable—for the

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premium; and the policy contained a clause providing that, if the note was not paid at maturity, the full amount of premium should be considered as earned, and that the policy should be void while the note remained overdue and unpaid. The note matured and was not paid, and during such time the schooner was lost by one of the perils covered by the policy.

Upon the trial in the Superior Court, in New York, the questions litigated were, whether David P. Dobbins, of Buffalo, was authorized by the Defendant to waive or modify the above clause, and if so, whether he in fact had done so. At the close of the evidence the Defendant's counsel moved for a dismissal of the complaint, which was granted by the Court, to which the proper exceptions were taken by the Plaintiffs' counsel. After judgment the Plaintiffs appealed to the General Term, and after affirmance by that Court, the Plaintiffs appealed to this Court.

That portion of the policy provided that, unless the note given for the permium should be paid at maturity, the policy should be void until the same was paid, constitutes a valid agreement between the parties (Beadle *v.* Chenango County Mutual Insurance Company, 3 Hill, 161). This was conceded upon the argument by Plaintiffs' counsel. It follows that the vessel having been lost after maturity and before payment, the Defendant is not liable, unless the Plaintiffs showed a waiver of that clause of the policy, or an estoppel. Subsequent payment of the note would not have aided the Plaintiffs. Such payment revived the policy only from the time of its being made, and would not make it valid during the interval that the note remained past due. Hence the proof given of offers to pay after the loss, and the inquiry whether when such offers were made the party making them had heard of the loss, were wholly immaterial. The only questions litigated upon the trial, upon which the right of recovery depended, were whether the Defendant had waived this provision, or whether what had been done estopped the Defendant from setting it up as a defence.

To determine these questions it was necessary to ascertain the extent of the authority of Dobbins, the Defendant's agent at Buffalo, and also what he had done in the premises. The

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evidence showed that the Defendant's principal place of business was in the city of New York; that Dobbins was its agent at Buffalo; that he kept an office there in which he transacted the insurance business of the Defendant at that place, which was of considerable amount; that he was furnished with printed blank policies, executed by the officers of the company; that he made contracts of insurance on behalf of the Defendant, filled up the policies in accordance therewith, and issued them to the assured; that he took notes for the permium without interest, running not to exceed four months; that, to a large extent, he had charge of the collection of such notes; that, at maturity, he was in the habit of renewing such notes with the knowledge of the Defendant by taking other notes for the whole or a part thereof, in his discretion, although he testifies that his rule was to require part payment and additional security.

These facts prove, I think, that Dobbins was the general agent of the company, with full power to negotiate contracts of insurance binding upon the Defendant; that, in making such contracts, he had authority to strike out the clause in question, and make such other modifications therein as he saw fit; that he had the like authority, in relation to the collection of the notes, to insist upon prompt payment, to require new notes with additional security, or give an extension upon original notes.

Dobbins testifies that he always included interest in new notes taken by him. This, in case of a new note payable in future, would have been necessary, or the company would have lost the interest. After maturity of an original note the law requires payment of interest until paid. While power to an agent should not be implied beyond what was fairly within the contemplation of the parties, as ascertained from the delegation of authority and the course of transacting business by the agent, as known to the principal in the present case, that delegation and the mode of transacting business by Dobbins shows that he was clothed with full authority by the Defendant, in respect to renewing, extending, and collecting premium notes in his hands which he had taken, and that this included power to make arrangements respecting the clause in question, which was ob-

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viously intended only to secure payment of the note (See Story on Agency, §§ 53, 106, 126; Sheldon v. The Atlantic Co., 26 N. Y. 460; Wood v. Poughkeepsie Mutual Ins. Co., 32 N. Y. 619; Lightbody v. The North Am. Ins. Co., 23 Wend. 18).

It remains to inquire whether Dobbins did, in fact, waive the clause, or do anything estopping the Defendants from defending upon that ground This must, in the present case, be determined by the testimony by E. K. Bruce, the agent of the assured; for, although his testimony was entirely contradicted by Dobbins, the Court, upon a motion for nonsuit, could not take the contradiction into consideration, as that only presented a question as to the credibility of witnesses, to be determined by the jury, which the Court refused to submit. The testimony of Moore, as to the conversation between him and Dobbins, was inadmissible, had it been objected to by the Defendant (Trustees Baptist Church v. Brooklyn Fire Ins. Co., 28 N. Y. 153). Besides, Moore, at the time, was not the agent of either party, and anything said to him could not constitute a waiver or an estoppel against the Defendant. Bruce testified that he was agent of the assured; that he saw Dobbins, at about the time the note matured, at the corner of the Exchange in Buffalo, and that Dobbins told him the note would be all right to lie over; that the company would as soon have the interest as the money; that he told Dobbins the endorsers were perfectly good; that Dobbins said he knew that. Upon cross-examination the witness testified that this was shortly after the maturity of the note; that he told Dobbins he wanted him to wait until the Zenobia came from Chicago for payment of that note—referring to the note given for the premium; that he told him the note was perfectly good; he said he knew that. Upon reexamination, in answer to a request to state all that was said, the witness testified that he told Dobbins that he wanted the note extended, and to wait until that vessel came down from Chicago; that he (Dobbins) said the note was perfectly good; that the company would as soon have the interest as the money, and made no objection whatever to the arrangement. It may be remarked that the credibility of this testimony was a question

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solely for the jury; and that neither the Court, upon the trial, nor this Court, has anything to do with the suggestions of counsel upon that question. This testimony, if credited by the jury, authorized a finding that the company agreed that the note might lie over for a few days, or for a reasonable time for the vessel to return from Chicago (upon which trip she was lost), although such agreement, being without consideration, had no validity as an extension of time on the note, and notwithstanding an action for its collection might have been immediately brought. Yet, when the payment was secured by a forfeiture of the policy, I think such agreement will estop the party from insisting upon the forfeiture. An agreement to waiver the forfeiture, like all others, requires a consideration.

A party is estopped when he has intentionally induced another to do or forbear the doing of acts, by his representations or agreements, in case such other would be injured by showing the representations untrue or the agreement invalid. In this case, Dobbins and Bruce both knew of the clause voiding the policy during nonpayment of the note. Both are presumed to have known that an agreement to extend the note had no validity, unless made upon consideration. Both knew the clause was only designed to secure prompt payment. Under these circumstances (if Bruce's testimony is true) they agree to extend the time for payment of the note. The fair inference is, that Bruce is thereby induced to delay payment, and that Dobbins designed he should so delay. Under such a state of facts it would be a fraud on the insured to insist upon the forfeiture (Young *v.* Hunter, 2 Seld. 203).

The judgment should be reversed and a ney trial ordered, costs to abide the event.

Concurring with GROVER was PARKER, J.

Affirmed.

JOEL TIFFANY,
State Reporter.

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WILLIAM A. HUSTED AND SELAH C. CARLL v. DANIEL H. CRAIG.

Contract must be performed entire—When?

Where there was a contract to furnish, cut, fit, and put down in defendant's house, the carpets and oil-cloths at a stipulated price, the contract is entire; and to entitle the Plaintiff to recover he must perform the whole contract in a skilful and workmanlike manner.

If he fail in respect to one or two of the rooms, he cannot recover as to any.

BOCKES, J.—The jury were at liberty to find, from the evidence that the contract was entire, to furnish and put down the carpets and oil-cloths in the Defendant's house at Peekskill, for the price agreed on.

Such contract would carry with it the tacit condition, imposed by law, that the articles selected should be put down in a proper manner. The condition, conceding the contract to have been as above stated, was a very important one, for the value of the property to be delivered depended, in a great degree, on its due execution. The question is whether there was evidence from which the jury could have found that the contract was entire—to furnish and put down the articles stated, in Defendant's rooms. Mr. Husted, one of the Plaintiffs, testified that Mrs. Craig, who made the purchase, stated "that she would make the bill with us, provided we would take them to Peekskill and put them down without expense. I told her that was not customary; however, I said I would do it, if she would be ready for them before our busy season commenced." He also stated that she finally decided on the patterns, and that the bill was $535.33. There was other evidence on this point, but none changing the contract, as given by the Plaintiff himself. That such was the agreement is substantiated by the action of the parties under it.

Contracts—Entire—Effect. 49 *N. Y.* 553; 130 *N. Y.* 579 (42 *St. Rep.* 736); 34 *Hun,* 67; 50 *Hun,* 254 (19 *St. Rep.* 220; 2 *N. Y. Supp.* 869); 43 *How. Pr.* 394; 51 *How. Pr.* 5; 73 *St. Rep.* 350 (38 *N. Y. Supp.* 161; 2 *Ann. Cas.* 375); 26 *Misc.* 768 (56 *N. Y. Supp.* 1024).

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The Plaintiffs immediately obtained the dimensions of the rooms, cut and sewed the carpets, and proceeded to lay them, with the oil-cloth, in the Defendant's house. On this evidence the jury might well have found—indeed, should have found, unless explained, modified, or contradicted by other proof—that the contract was entire, to furnish, prepare for laying, and put down the carpets and oil-cloth in the Defendant's house.

But even if there were other facts in the case tending to explain or modify the Plaintiff's testimony, still the question was for the jury whether such was the contract.

It was insisted, on the part of the Defendant, that the articles were improperly cut and made, and did not fit the floors for which they were designed. This was admitted as regards two of the rooms, and the Plaintiffs withdraw all claims for those two carpets. The Defendant refused to accept any, and immediately returned all on deposit, subject to the Plaintiffs' order. In this condition of the case, the Defendant asked the Court to charge the jury, in substance and effect, that if they should find the contract to be entire to furnish for the Defendant's house all the goods for which the Plaintiffs claimed to recover, and that one or more of the articles furnished was made and laid in such an unskilful and unworkmanlike manner as not to entitle the Plaintiffs to recover for it, the Defendant was justified in returning the goods and Plaintiffs could not recover; also, that if the jury should find that the contract was entire, it being admitted that the Plaintiffs were not entitled to recover for two of the carpets furnished, by reason of the unworkmanlike manner in which they were laid down, the Plaintiffs could not recover. These instructions were refused, and on the ground that there was no evidence that the contract was entire. In this there was error. There was evidence, as we have seen, if indeed not conclusive evidence, that the contract was entire, to furnish, cut, make, and lay down the articles in the Defendant's house; and under such contract the Plaintiffs would be bound to cut, make, and lay them in a skilful and workmanlike manner.

If they had undertaken so to do, they were bound to perform-

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ance, as in any other case of executory contract, before they could recover the contract price.

According to the Plaintiffs' evidence, they had undertaken to do in this case what was not customary on a sale of floor furniture. Mr. Husted says: "Mrs. Craig said she would make the bill with us, *provided* we would take them to Peekskill and put them down without expense. I told her that was *not customary* however, I said I would do it."

Accepting this as the contract—and the jury were certainly authorized to hold the Plaintiffs to their own statement of the case—the fitting the carpets to the rooms and putting them down were a material part of it, to be performed in a workmanlike manner—that is, with ordinary skill.

If the contract was entire, the Plaintiffs were not entitled to recover (no part having been accepted), without a delivery or an offer to deliver all the articles contracted for, in the condition required by the contract (1 Baker *v.* Higgins, 21 N. Y. 397; Shields *v.* Pettie, 4 N. Y. 122; Smith *v.* Brady, 17 N. Y. 173; Pike *v.* Butler, 4 N. Y. 360; Pullman *v.* Corning, 9 N. Y. 93).

As the case is now presented the Plaintiffs should have been nonsuited.

In the most favorable aspect for the Plaintiffs the case should have been submitted to the jury with the instructions substantially as stated in the Defendant's request.

The judgment of the General Term and of the Special Term must be reversed, and a new trial granted—the costs to abide the event.

All concur, except SCRUGHAM, J., who expressed no opinion.

Reversed.

JOEL TIFFANY,
State Reporter.

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JOSEPH STRINGHAM, APPELLANT, *v.* THE ST. NICHOLAS INSURANCE COMPANY, RESPONDENTS.

Agency of Insurance Companies—What Evidence of?

Evidence that a party assuming to act as the agent of an Insurance Company, was authorized by the company to purchase, at their expense, a policy register in which to keep an account of his business for the company, is not sufficient to establish the general agency of such party.

W. Dorsheimer for Appellant.
J. C. Dimmick for Respondents.

DAVIES, CH.J.—This is an action upon a policy of insurance, issued by the Defendants to one L. Austin Spaulding, on the 12th day of July, 1856, in the sum of $3,000, upon a stone flouring mill and machinery therein. On the 30th of June, 1857, upon payment by Spaulding, the policy was renewed for one year from July 12, 1857, to July 12, 1858. On the 25th of August, 1857, Spaulding assigned the policy and all his interest therein to U. H. Wolfe, and on the 5th day of October, 1857, Wolfe assigned the policy and all his interest therein to the Plaintiff. The property covered by the policy was totally consumed by fire on the 15th of November, 1857. The policy contained this clause: "The interest of the assured in this policy is not assignable, unless by consent of this corporation, manifested in writing; and in case of any transfer or termination of the interest of the insured, either by sale or otherwise, without such consent, this policy shall from thenceforth be void and of no effect."

Upon the back of said policy were printed two blank consents, as follows: "The St. Nicholas Insurance Company of the City of New York hereby consent that the interest of ——

Declarations of agent—To show agency. 57 *N. Y.* 394; 174 *N. Y.* 191; 79 *Hun,* 544 (61 *St. Rep.* 551; 29 *N. Y. Supp.* 932); 23 *Misc.* 639 (52 *N. Y Supp.* 154); 2 *T. & C.* 265; 41 *Super. Ct.* 46; 19 *St. Rep.* 293 (3 *N. Y. Supp.* 866); 46 *St. Rep.* 396 (19 *N. Y. Supp.* 377).

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in the within policy be assigned to ———, subject nevertheless to the conditions therein contained. ———, Secretary."

The said consents were filled up and signed previous to the execution of said assignments, respectively, on the 25th of August and 5th of October, 1857, so as to read as follows: "The St. Nicholas Insurance Company of the City of New York hereby consent that the interest of L. A. Spaulding in the within policy be assigned to U. H. Wolfe, subject nevertheless to the conditions therein contained. H. A. BREWSTER, Agent."

The second consent was in all respects similar, except that the name of U. H. Wolfe appeared in place of L. A. Spaulding, and that of Joseph Stringham in place of U. H. Wolfe. The word "Secretary," in each of said consents, was erased, and the word "Agent" written in its place. The defence was, that as the company had never given its consent that the policy might be assigned to Wolfe, and by Wolfe to the Plaintiff, and the same having been assigned without such consent, the policy had become void and of no effect. The referee who tried the action determined that the company had never given its consent to such assignments; that the consents given by Brewster, as agent, were unauthorized, and not binding on the company; and thereupon dismissed the complaint and gave judgment for the Defendants, which, on appeal, was affirmed at the General Term. The Plaintiff now appeals to this Court. The only question seriously controverted upon the trial was whether Brewster had authority to assent, on behalf of the company, to the assignments by Spaulding and Wolfe.

The Plaintiff sought to establish such authority upon the grounds:

1. That Brewster had, on the 5th of September, 1857, notified the Defendants that Spaulding's interest in the policy had been assigned to Wolfe, and that the company had by silence ratified the same.

2. That Brewster, as agent of the Defendants, had authority to grant the assent of the company to those assignments.

The first position was sought to be established by the testimony of Brewster. It had appeared on the trial that the secre-

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tary of the Defendants, under date of December 4, 1857, wrote to Brewster, informing him that the Plaintiff claimed for a loss under Policy No. 13,495, and renewal thereof, issued to L. A. Spaulding, on flouring mill at Lockport, and stating, "As we have no evidence on our books of there having been any change of interest, except to L. Austin Spaulding, we enclose a copy policy as recorded on our books. If there has been any further change, please write it out in full, as it is in the original, and return it to us at your earliest convenience." On or about the 26th of December, 1857, Brewster returned the copy policy, with an entry in red ink written in it after "other insurance permitted without notice until required," as follows: "I find a memorandum on one record, 'August 22, 1857, assigned to U. H. Wolfe,' 'October 3, 1857, assigned to J. Stringham, in trust.'" The copy policy with this memorandum therein was enclosed in a letter as follows:

Rochester, Dec. 26, 1857.

"W. S. SLOCUM, Esq.

"DEAR SIR:—Enclosed I return you the policy you sent me, with entries on it made on my books, and as I supposed reported to you by my clerks. H. A. BREWSTER."

Slocum, the secretary of the Defendants, testified: "All the responsible correspondence of the company was conducted by me, and passed under my scrutiny. Before the fire which destroyed the Spaulding mill, I had no knowledge that Brewster had signed a consent to the assignment of this or any other policy; no notice before that had ever come to me, or to the office, that I know of, that he had signed or given any such consent. Consents to assign policies, when given by the company, were signed by me as secretary."

Brewster testified that on the 1st of January, 1858, he transmitted to the Defendants a copy of an account which was marked No. 2, which contained a memorandum at the foot thereof in these words:

"*Rochester, Sept.* 5, 1857.—Aug. 27. No. 13,495, assigned by L. A. Spaulding to U. H. Wolfe.

"True copy. H. A. BREWSTER,"

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The witness Slocum testified that in January or February, 1858, he was at Rochester, when the witness Brewster cut a leaf from his letter book and gave it to him. It was an impression taken by letter-press, and was in these words:

"H. A. BREWSTER,

In account with the ST. NICHOLAS FIRE INS. Co.

		Dr.
1857. Aug. 6, for prem. of Chas W. Thompson, No. 17,385	$15.00	
Cr.—By 10 per cent. commission on $15.00..		1.50
Balance in hand of E. Pond, Assignee		13.50
		$15.00-$15.00

Sept. 6. To balance of acct. as above.....$13.50.

E. E.

"Rochester, Sept. 5, 1857."

"August 27. No. 13,495, assigned by L. A. Spaulding to U. H. Wolfe. "H. A. BREWSTER, Agent."

A letter dated Sept. 5, 1857, by H. A. Brewster to the Defendants, was produced by the Defendants, on the Plaintiff's call, and marked No. 3, and the account enclosed was also produced and marked by the referee No. 4, and which account, marked No. 4, was the words and figures following:

"H. A. BREWSTER,

In account with the ST. NICHOLAS FIRE INS. Co.

		Dr.
1857. Aug. 6, for prem. of C. W. Thompson, 17,385	$15.00	
Cr.—By 10 per cent. commission.....		1.50
By draft $13.35, and exchange to bal.		13.50
E. E.		$15.00—$15.00

"Rochester, Sept. 5, 1857."

Slocum further testified: "I opened the letter No. 3, which had enclosed in it the paper No. 4, and nothing else. No. 4 was then just as it is now. It had nothing more upon it. We never received, to my knowledge or information, any paper

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from which this letter-press copy is an impression, nor any notice before the loss of the assignment, or of Brewster's consent."

The witness Brewster then testified that the leaf produced by the witness Slocum was the one he (Brewster) cut from his letter-book; that it was an impression taken in his letter-book from No. 4, by his letter-press. Both were in the handwriting of his clerk, Davis. That the words in the letter-press copy, "August 27. No. 13,495, assigned by L. A. Spaulding to U. H. Wolfe," must have been cut off from No. 4, since it was enclosed to Defendants.

It is stated in the case that, "on comparison by counsel of the respective parties, and the referee, it was evident beyond dispute, that the said letter-press copy was not an impression from No. 4; the lines were not of the same length; the same words which were written upon and composed one line in the one, were written on, and made two lines in the other. The same word was written out in full in the one, and abbreviated in the other. In the letter-press copy the lines under the figures were in red ink, and upon No. 4 in black ink. The blank paper at the bottom of No. 4, below the writing, more than covered the whole of the impression on the letter-press copy." It might have been added that the words, "Balance in hand of E. Pond, assignee," appear in the letter-press copy, and are not in No. 4, but in lieu thereof the words, "By draft 13.35, and exchange to bal.;" and that in the letter-press copy appear these words: "Sept. 6. To balance of acct. as above," and which do not appear at all in paper No. 4. It is too clear to need further illustration, that Brewster was greatly in error in testifying that the leaf produced was a letter-press copy of paper No. 4, and that the latter had been mutilated, as well for the purpose of concealing the fact that the Defendants had notice of the assignment of Spaulding to Wolfe, as to convict them of a great fraud in manufacturing testimony. This bungling attempt to fasten notice of the assignment of Spaulding to Wolfe upon the Defendants, was a signal failure, and justly casts great discredit upon the other testimony of Brewster. It

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is not now urged that the Defendants had any notice of these assignments prior to the destruction of the property covered by the policy, and therefore all pretence of ratification as assent thereto by the Defendants is abandoned.

It is now contended, however, that Brewster, as agent of the Defendants, had authority to grant the assent of the company to these assignments. It is very apparent from the testimony and the correspondence between Brewster and the company what his powers were.

1. He had authority to receive applications for insurance, and make them binding upon the company for the period of ten days. At the expiration of that time, if the company did not assume the risk, it terminated.

2. He had power to receive the premiums on renewals of policies and transmit the same to the company, and if accepted by them, on the receipt by him of the renewal certificate, signed by the officers of the company, to deliver the same to the assured.

His duties seem to have been confined almost exclusively, if not entirely, to these two matters. I do not attach any importance to the statement made by Brewster, that his impression is that he executed other permissions to assign policies; he says, "It is an impression; I cannot state postively if such were executed, and I cannot say that they were"—for the reason already suggested, and for the additional one, that the statement is very vague and indefinite. If he had been in the practice of granting such consents, he could easily have ascertained the fact and mentioned the instances. The isolated case referred to in Defendants' letter of February 13, 1856, wherein they state, "We have also noted the assignment of 8705, as requested," is too indefinite and uncertain to show that the agent had a general authority to give similar consents in other cases.

But the language of the policy, and the blank consent printed on the back thereof, unmistakably indicate the steps to be taken by a policy holder, when a consent to an assignment was desired, and the officer or agent only authorized to give the consent to assignments. As already observed, the policy carried

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on its face notice to all holders, that the interest of the assured was not assignable, unless by consent of the corporation manifested in writing, and the printed blanks on the back of the policy were like notice of the form of such consent, and the officer alone authorized to give it, and manifest the assent of the company. It was full notice to all that it must be done by its secretary, and the erasure by Brewster of the word "Secretary," and writing in place thereof the word "Agent," was an admonition to the parties that the authority to give the consent was in the secretary only. It is doubtless true that the person applying to Brewster for these consents may have supposed that he had authority to grant them, or if not, that his acts would be ratified by the Defendants. But Brewster could not create an authority in himself to do the particular act, by its performance, or asserting his authority to do it. To bind his principal, his character as agent must be established and of so general a nature as to give him authority to do the act in question, or subsequent ratification, with full knowledge, must be established. The proof in this case falls far short of making out either of these positions. It was sought to bring home to the Defendants knowledge of these assignments, by showing that Brewster had entered in books kept by him at Rochester the fact that he had given the consent to these assignments. To make the contents of these books knowledge to the Defendants, it was proven that the Defendants, on the application of Brewster, had paid for one of them a small sum, and that said book was kept in the office of said Brewster, and was lettered on the back, "St. Nicholas Insurance Company, Policy Register, Rochester Agency, 1855."

The person who procured said consents testified, that on both occasions of procuring the same, "I saw said Policy Register, and that Brewster entered in said Policy Register the fact of such permission and assignment, and its date," and that said person saw on these occasions each of said entries made. There was no evidence offered that the Defendants or any of their officers ever saw said book, or had any knowledge of its contents; and it affirmatively appeared that all the knowledge they

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or any of them had in relation to said book, was derived from a letter written by said Brewster to the secretary of the Defendants, under date of "Rochester, August 6, 1855," in which he says: "We find it to be very necessary, as we advance in our business for you, that we should have a Policy Register for our own use. The companies we represent have generally preferred the purchase of a book here, and we charge it to them, though some prefer to sent us books. Those we have cost us $3.50, and are expressly got up for us of a uniform kind. Can we order one for you?" To this letter the secretary of the Defendants replied, under date of August 9, 1855: "Yours of the 6th instant is received. You are at liberty to purchase the necessary books on behalf of this company for the transaction of its business in your city."

The counsel for the Plaintiff then turned to page 40 of said book, where the policy in suit is registered, and pointed out therein, against the description of the subject of insurance, the following entries in red ink:

"Assigned August 27, 1857, to U. H. Wolfe.

" October 8, 1857, to Joseph Stringham, Buffalo."

Defendants' counsel objected to the reading of either of said entries in evidence from said book, and the referee sustained the objection, and excluded the evidence, and the Plaintiff's counsel then and there duly excepted to such decision. It certainly cannot be successfully maintained, that the circumstance that the Defendants paid or consented to pay for the cost of this register for Brewster's own use, changed in any aspect relations then existing between Brewster and the Defendants. It is not suggested that the Defendants, or any of their officers, ever saw the said register, or were at any time made acquainted with its contents, or the lettering upon it, or the particular purposes to which it was applied. It did not constitute Brewster the clerk of the Defendants, or bind them by the entries he or his clerks made therein. Those entrise were irrelevant to prove the fact that Brewster was the agent of the Defendants to give their consents. That must be established by evidence *aliunde* his acts or declarations.

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Neither the declarations of a man, nor his acts, can be given in evidence to prove that he is the agent of another, or the extent of his powers (Scott v. Crane, 1 Conn. Rep. 255; Plumsted's Lessees v. Rudebagh, 1 Yeates, 502, 505; Lessee of James v. Stookey, 1 Wash. C. C. Rep. 330).

Brewster testified that his agency for the Defendants commenced upon the receipt of the letter from the secretary of the Defendants of April 13, 1855, and he produced the letter, and it was read in evidence. There was no proof that any other or greater powers were ever conferred upon him. It was in reply to a letter from Brewster, in which he says, "I should be glad to send your company risks, and can send you a good line at good rates." The Defendants' secretary said: "Your views with regard to a local agent to attend to the interest of our company in your city are correct. Should you feel disposed to send us applications of character mentioned in your letter, we will be happy to respond to them. As our directors do not allow agents to issue policies or make policies binding for terms of over ten days, as you can see by the enclosed receipts, we should restrict you also. . . . We have not had any printed applications of our own, but intend to get some printed soon. Should you send any applications, you can for the present use such as you have on hand, substituting our name, &c. If desired, we will forward you some of our certificates to bind risks temporarily."

The certificates so forwarded were in this form: "St. Nicholas Insurance Company, No. 23, office corner of 8th Avenue and 14th St., New York. This certifies that I, H. A. Brewster, agent for the city of Rochester, have received of——dollars, being — months premium on $ — Insurance as per application No. —, dated the — day of —, 18 —, to be forwarded to their office as above for their action. It being understood and agreed between the parties that the said St. Nicholas Insurance Co. are not liable for this certificate beyond ten days from the date of the application referred to, unless the risk is accepted and a policy made and delivered for the whole term of — months,

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and in case the risk is not accepted the premium is to be returned.

(Signed) WM. WINSLOW, *President,*
WM. S. SLOCUM, *Secretary.*

"Dated this — day of —, 185—.

Agent."

Brewster testified that he received these certificates as early as when he commenced business for the Defendants, as aforesaid, and exhibited them freely and generally to customers and persons who transacted business with the company at said office, No. 1 Arcade Buildings. Under Plaintiff's objection, Slocum testified that some time in the early part of the year 1857, a conversation was had at the office of the company between the president of the company, the witness, and Brewster, respecting his power as agent. He wanted authority to write or issue policies for the Defendants; he said he could do a large business, and a more desirable class of business, if he could issue policies. "I don't recollect the particular words, but we declined, as we had not given such authority to agents."

It is then apparent that the powers of Brewster as agent were restricted to the receipt and forwarding to Defendants of applications for insurance, and authority to make a policy for only ten days; and the certificates which were exhibited to the customers generally, contained information of the character and extent of the powers of the agent. The declarations and acts of Brewster within the scope of his agency, if they had been admitted, would not be of any materiality. The declarations and representations of the agent, when not expressly authorized by the principal, must, in order to bind him, be within the scope of his agency (N. Y. Life Insurance and Trust Co. v. Beebe, 3 Seld. 364; Olding v. Smith, 11 Eng. Law and Eq. 424; Very *v.* Levy, 13 How. U. S. Rep. 345).

In the case in 3 Selden (*supra*), Schermerhorn, the agent, swore that he was the agent of the Respondents in procuring a loan for them from the Appellants, and it was contended, on the part of the Appellants, that Respondents were concluded by his acts and representations, the same as if they were their

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own, upon the principal which pervades all cases of agency—that the principal is bound by all acts of his agent within the scope of his agency, which he holds him out to the world to possess, and that where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time, and constituting part of the *res gestae*. The Court say: "The declarations or representations of the agent, when not expressly authorized by the principal, must, in order to bind him, be within the scope of his agency. But that was not the case here. Schermerhorn's agency was to obtain a loan for the Respondents from the Appellants. His alleged declarations, which are relied upon, were entirely without the scope of such or any other agency." In that case, there was no evidence to show that the Respondents knew of the alleged representations of Schermerhorn, or that they ever authorized him to make them. So in the case at bar there is no evidence that these Defendants ever authorized Brewster to give the consents to the two assignments mentioned, or that they ever knew that he given such consents, until after the happening of the loss under the policy. We have seen what were the actual powers conferred by the Defendants upon Brewster, and what was the scope of his agency.

Not only was the power to give the consents in question not within the scope of that agency, but the policy itself, and the blank consents endorsed thereon, gave notice to all holders of such policies that an agent of the company had no such power.

In view of all these considerations, the referee properly excluded the books kept by Brewster, and the entries therein. They were illegitimate to enlarge, alter, or modify his power as agent.

The judgment of the Supreme Court affirming the judgment upon the report of the referee was correct, and should be affirmed, with costs.

PARKER, J.—The question litigated in this action is, whether H. A. Brewster was the agent of the Defendants, and as such

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authorized to give their consent to the assignments of the policy, through which the Plaintiff claims it.

The referee nonsuited the Plaintiff, on the ground that he had failed to show that the Defendants had consented, as required by the policy, to the assignment of it, or that Brewster had any authority to give such consent.

It is very clear, I think, that Brewster had, in fact, no such authority. But it is insisted by the Plaintiff's counsel that the company dealt with Brewster in such a manner that he was justified in holding himself out to the public as its general agent; that he did represent himself to the Plaintiff as such agent, and, therefore, that the company is bound by his acts in signing the consent to the assignments. It is not contended that the Plaintiff was induced to accept the consent of Brewster as that of the company, by any act of the company implying or recognizing the authority of Brewster to give it, which came to the knowledge of the Plaintiff, but that the acts of the company justified Brewster in assuming authority to give the consent, and therefore they are bound by it.

This is but stating, in another form, that Brewster was, in fact, the agent of the company, which proposition, as already intimated, I do not regard as sustained by the evidence.

Neither do I see anything in the evidence warranting the statement that the Defendants had an office in Rochester, in charge of which Brewster was acting as clerk. The fact that he was authorized by the company, at his request, to purchase at their expense a policy register, in which to keep an account of the business which he should do for the company, comes far short of establishing the fact claimed for it.

I thing the nonsuit was properly upheld by the General Term, and its judgment should be affirmed.

All affirm.

JOEL TIFFANY,
State Reporter.

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HANNAH TOBIAS, APPELLANT, v. ANN E. COHN AND WILLIAM COHN, RESPONDENTS.

Life Estate—Lease—Trespass—When action maintainable?

The Plaintiff having a life estate in the premises and leasing the same from year to year, cannot maintain an action in the nature of trespass for an injury done to the possession during the continuance of the lease.

APPEAL from the Supreme Court.—The action was trespass, for entering a yard or garden in the possession of the Plaintiff, erecting a fence across it, and depriving her of the use of more than half the premises. On the trial before Judge Ingraham, at the New York Circuit, it was proved that the Plaintiff was the widow of Silas Tobias, deceased; that at the time of his death and for some time prior thereto, he owned two lots in Fourth street, New York, and three buildings erected on the front portion of such lots; that he occupied part of the house known as No. 615 as his dwelling, and the whole of that part of the lots in the rear of the three buildings as his yard; that as well before as after his death, it was enclosed and used as a garden, and that it contained choice plants, fruit trees, and shrubbery, and was bounded by an outer hedge.

By his will he gave to his widow the free use and enjoyment of the portions of the house they then occupied as a residence, "with the right to the front basement and yard, now in use and enjoyment by herself and me, being the same premises now occupied and enjoyed by herself and me at the date hereof, to have and to hold the same during the full period of her natural life, and till after her death and burial." There was also a provision that she might have in lieu thereof, at her election, any other suitable residence in any other house belonging to him at his decease; but it did not appear that she had availed herself of this provision.

In May, 1858, the Plaintiff rented the premises, including

Trespass—Real property—Possession. 19 *St. Rep.* 10 (2 *N. Y. Supp.* 661).

the yard or garden, to a Mrs. Weedham, at $200 a year. In

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the month of October following, and while the property was in the possession of the lessee, the Defendant, Mrs. Cohn, who was a daughter of the testator, caused a fence to be erected across the garden, and destroyed the plants and shrubbery in that portion of it not immediately in the rear of No. 615.

The widow notified her to take down the fence, and Mrs. Cohn said she would do so if the Plaintiff wanted to come back there to live.

The tenant, after the fence was erected, refused to pay the agreed rent, and the Plaintiff then rented the premises to her at the reduced rate of $14 a month.

Upon these facts the Court dismissed the complaint, and the decision was sustained on appeal to the General Term.

Justus Palmer for Appellant.
John C. Dimmick for Respondent.

PORTER, J.—The Plaintiff was entitled to the use of the entire garden, as it had been occupied previous to the testator's death. She had a life interest in the premises; and though the declared purpose of the gift was to provide her with a residence, there was no limitation of the estate to a mere right of personal occupancy. She was at liberty to rent the premises; but when she did so, she parted with her possessory interest during the term of the lease.

The Court was right, therefore, in dismissing the complaint. The action was for an injury to the possession, which was in the tenant and not in the Plaintiff (Holmes *v.* Seely, 19 Wendell, 507).

There could not be a recovery for injury to the inheritance, as there was no allegations in the complaint, either of the destruction of the fruit trees and shrubbery, or of the reversionary interest of the Plaintiff in the premises.

The judgment should be affirmed.

Judge GROVER also read an opinion for affirmance.

Judgment affirmed.

JOEL TIFFANY,
State Reporter.

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MARGARET P. BUNN, EXECUTRIX, &c., OF OAKLEY BUNN, DECEASED, RESPONDENT, v. WILLIAM VAUGHAN, APPELLANT.

Statute of Uses and Trusts—Personal Property.

The statute of uses and trusts respecting lands, does not apply to trusts created in respect to personal property.

SCRUGHAM, J.—No discretionary power was conferred upon the Plaintiff's intestate by the tripartite agreement or the mortgage executed to him therewith.

The amount which he was authorized to apply to the support and maintenance of the *cestui que trust* was not left to his discretion, but was such only as should be actually necessary for that purpose.

The power was thus perfectly defined, and could be duly executed, as well by another as by the trustee named in the instrument. The trust was in personal property, and, on the death of the trustee, devolved, with the property, upon his representative.

While it is conceded that this is the rule at common law, it is claimed that it is abrogated by our Statute of Uses and Trusts, and that the trust, upon the death of the trustee, vests in the Supreme Court, and is to be executed under its direction, by some person appointed for that purpose. This would be so if the trust were in real estate; but it is not, and the section of the Statute of Uses and Trusts which vests the trust in the Supreme Court upon the death of the trustee, does not apply to trusts in personal property. This is clearly shown in the opinion of Mr. Justice Cowen, in Kane v. Gott (24 Wendell,

Trust—Personal property—Succession. 84 *N. Y.* 87; 88 *N. Y.* 72; 2 *Abb. App. Dec.* 27; 60 *Barb.* 13; 63 *Barb.* 572; 55 *Hun*, 301 (28 *St. Rep.* 491; 8 *N. Y. Supp.* 411); 5 *Abb. N. S.* 362; 16 *Abb. N. S.* 470; 55 *How. Pr.* 92; 61 *How Pr.* 180; 62 *How. Pr.* 232; 9 *Abb. N. C.* 151; 36 *Super. Ct.* 468; 2 *Redf.* 62; 5 *Redf.* 12.

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641), by an examination of the Statute so thorough, and arguments so convincing, as to preclude further profitable discussion of the subject; and the point in this case may properly be answered in the very words of Judge Comstock in delivering the opinion of this Court in Savage v. Burnham (17 N. Y. R. 561). "This is a trust in personal property with which the Statute of 'Uses and Trusts' in lands has nothing to do."

At the trial several exceptions were taken to the rulings of the referee as to the admissibility of evidence; but the only one referred to by the Appellant, in the points submitted on this appeal, is to the admission of a written memorandum or account kept by the trustee, showing payments made to him by the Defendant. The Defendant had subpœnaed the Plaintiff to produce this, and before its production had given parol evidence of its contents. It contained no charge against the Defendant, but was an admission of payments made by him.

Under these circumstances it was properly admissible in evidence, and, if its admission by the referee had been error, the Defendant could not have been prejudiced by it, as the evidence was in his favor, and did not prevent his proving payments larger than, or additional to, those mentioned in the memorandum.

The judgment should be affirmed.

All the judges concurring except BOCKES, J., who expressed no opinion.

Judgment affirmed.

JOEL TIFFANY,
State Reporter.

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JOSEPH SANFORD AND SARAH E. SANFORD v. NOAH NORRIS.

Statute of Frauds—Trustee.

A party purchasing and taking title to property under an agreement to hold the same for the benefit of the party employing him thus to purchase and hold, cannot avail himself of the provisions of the statute for the prevention of frauds, to perpetrate a fraud by holding the same for his own benefit.

He becomes a trustee and holds for the benefit of the party under his agreement.

BOCKES, J.—The Defendant obtained title to the premises under an arrangement with the Plaintiff, Mrs. Sanford, by which he was to purchase the property for her benefit.

He paid the trifling sum of $20, and within a few months after sold for $2,000. He allowed Mrs. Sanford to have $1,000 of the advance, but refused to recognize her right to the remainder, and defends this action for such balance on the ground that the arrangement with Mrs. S., under which he took the title, was void by the statute of frauds.

The circumstances attending his purchase are not obscured in the least by any doubts, either as regards the facts or their moral bearing; nor is any excuse or apology offered for his violating faith; and the simple question presented to this Court is, whether the fruits of his perfidy are secured to him by a law having for its object the prevention of frauds.

It stands indisputably proved that the Defendant obtained this title on the pretence that he was purchasing for Mrs. Sanford, as a friendly act to her, and under an agreement with her that he would take and hold the title for her benefit. Having thus obtained the title in himself, he claims and insists that he is under no legal obligation to carry out the arrangement because it is not evidenced by a writing, and that he may violate the trust and confidence reposed in him with impunity.

But the law will not give its aid in support of a wrong and fraud so flagrant. If the question could ever have been consid-

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ered open for discussion, it must now be deemed settled by the recent decision of this Court in Ryan *v.* Dox (34 N. Y. 307), wherein the equitable principle is recognized as the established law of this State, that "equity will at all times lend its aid to defeat a fraud, notwithstanding the statute of frauds."

The case cited is very nearly the counterpart of this under consideration; where the Defendant purchased on a mortgage sale, at an inadequate price, under an agreement with the mortgagor that the purchase should be for the benefit of the latter; and it was held that he was to be deemed the trustee of the party for whom he undertook the purchase, and that it was no objection that the agreement was not in writing. In the opinion in that case the learned Chief Judge has fully discussed the question, here again presented, on principle and authority, and alludes approvingly to the disposition of this case at General Term. The case of Morey *v.* Herrick (18 Penn. St. Rep. 128) and of Soggins *v.* Heard (31 Miss.; 2 Geo. 426) are also directly in point. The decision in Ryan *v.* Dox renders further consideration of this case quite unnecessary.

The judgment should be affirmed.

All concur except HUNT, J., who dissents.

JOEL TIFFANY,
State Reporter.

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CALVIN DAY AND OTHERS, APPELLANTS, v. THOMAS P. SAUNDERS, RESPONDENT.

Negotiable Paper—Debt past due—When held for value.

A party taking negotiable paper before maturity, in payment of a debt past due, is thereby constituted a holder for value.

Pomeroy & Southworth for Appellants.
Brown & Beach for Respondent.

DAVIES, CH.J.—On the 2d of November, 1859, the Plaintiffs were the owners and holders of four promissory notes made by one J. H. Whipple. The whole amount due thereon for principal, interest, and protest fees, was on that day $1,031.25. Two of the notes were over-due, upon which suits had been commenced by the Plaintiffs against Whipple, and on said 2d of November, Plaintiffs agreed to accept Whipple's note for the amount of said four notes, at forty-five days, to be endorsed by the Defendant Saunders. On the 22d of November, 1859, Plaintiff's attorney received the note in suit endorsed by Saunders, delivered up to Whipple his four notes, and Whipple paid said attorney's costs incurred in the two suits, on the two over-due notes of Whipple, amounting to the sum of $24.92, and gave a receipt therefor in these words: "Received payment November 22, 1859, and suit discontinued." Saunders' endorsement had been obtained in blank, and to be used for a different and another purpose. On the trial, the Court held that the Plaintiffs were only entitled to recover to the extent of the amount of the two notes of Whipple, not due, at the time of the delivery of the note in suit to them, and that said Plaintiffs were not bonâ fide holders of the note in suit for the value or

Bills and notes—Rights of transferee—Bona fide holders. 137 *N. Y.* 118 (50 *St. Rep.* 198); 37 *N. Y.* 442; 51 *N. Y.* 326; 114 *N. Y.* 136 (23 *St. Rep.* 138); 56 *How. Pr.* 30, 496; 59 *How. Pr.* 297; 2 *Lans.* 133; 5 *Daly,* 193; 1 *City Ct.* 26; 11 *Misc.* 8 (63 *St. Rep.* 439; 31 *N. Y. Supp.* 841).

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amount of the two notes of Whipple, which were over-due. The Plaintiffs had a verdict for the amount of said two notes not due, amounting to $239.65, which judgment on appeal to the General Term was affirmed, and the Plaintiffs now appeal to this Court.

The Supreme Court was clearly correct in holding that the Plaintiffs were entitled to recover against this Defendant upon the note in suit, to the extent that they were bonâ fide holders thereof. In Van Duzer v. Howe (21 N. Y. 531) this Court decided that a party who entrusts another with his acceptance in blank is responsible to a bonâ fide holder, although the blank be filled with a sum exceeding that fixed as a limit by the acceptor. But the Court erred in holding that the Plaintiffs were not bonâ fide holders of the two notes, over-due, for the payment of which the note in suit was equally received, as for the two notes not then due. The facts are indisputable that the note in suit was transferred in payment of the four notes of Whipple then held by Plaintiffs. The facts in this case are not distinguishable from those presented in Brown v. Leavitt (31 N. Y. 113). It was there stated, that the note in suit in that case was endorsed and delivered by persons composing the firm of Zebley & Co. to the Plaintiff's testator, before it fell due, in payment, so far as it went, of a larger note then held by the testator and over-due. It was received with other notes, and a balance in cash as such payment of the larger note, delivered up to Zebley & Co. We then said, "In this State it is settled by abundant authority that this transaction constituted the Plaintiff's testator a holder for value of the note in question. A further discussion of the question might lead to a suspicion that the law was in doubt on the point."

The judgment should be modified by increasing the amount of the verdict from $239.65 to the amount due upon the four notes at the date of the verdict, and that judgment for that sum and interest thereon be affirmed, with costs.

If the parties cannot agree upon such amount, then the Supreme Court is directed to ascertain the same, and render judgment for the Plaintiffs(with costs, accordingly.

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GROVER, J.—The exception taken by Plaintiff's counsel, upon the trial, to the charge of the judge as given, and to the refusal to charge as requested, presents the only real question in the case. That question is whether a party taking negotiable paper before maturity, in payment of a debt past due, constitutes a holding for value. This precise question was decided affirmatively in Brown *v.* Leavitt (31 N. Y. 113), by this Court. In Young *v.* Lee (2 Kern. 551), the like rule was applied when the debt for which the note was taken had not become due. It is manifest that there is no distinction in principle between a case when the debt is due and when not due. These cases should put an end to the question in this State. The counsel for the respondent insists that the rule cannot apply to a case when the debt is due, for the reason that a new promise by a debtor does not satisfy or extinguish an existing debt. He overlooks the reason for the latter rule, that is, that such new promise is no consideration for an agreement to discharge the debt. It is nothing more than promising to do what the debtor is already bound to do.

In the present case there was a consideration, viz., the additional security of the Defendant's endorsement. The evidence in the present case proved that the note in suit was taken in payment of the four notes given up. The Court so held as to the two small notes not due. The evidence as to the note in suit being received in payment of the notes past due was precisely the same that it was in regard to the notes not due, and the judge should have gone further, and upon the evidence directed a verdict for the Plaintiffs for the amount of the notes in suit, that being the amount of the four notes for which it was given.

The judgment must be reversed and a new trial ordered, costs to abide event.

Reversed.

JOEL TIFFANY,
State Reporter.

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JOHN G. RITCHMYER, RESPONDENT, v. BENTON G. MORSS AND OTHERS, APPELLANTS.

Trespasser builds—Building passes with Realty, when.

If a trespasser erects a building upon the land of another without any agreement or understanding in respect thereto, such building becomes a part of the realty, and passes therewith.

DAVIES, CH.J.—The Plaintiff claims in this action to recover the value of a certain building, located upon the lands of the Defendants, which he claims as owner, and which was taken possession of and removed by Defendants.

The builing was erected by Mr. Vroman, in the fall of 1849, at which time the land upon which it was erected was owned by Alonzo C. Paige and others. It was a good frame building, as described by the Plaintiff, 15 x 16 feet, 10-feet posts, nicely enclosed with pine siding, pine shingles, a good cornice on one end, painted white with two coats; one door outside, and one inside; two windows—one in the front end, and one in the side, and a window in the back end.

There was a partition in it lathed and plastered, counter and shelves in the front part of the building. The building stood on a foundation of loose stones with a back chimney in it. The Plaintiff purchased it on the 21st of November, 1859, having previously occupied it for six years. The Defendants removed it in December, 1860. The Plaintiff testified he did not know by whose authority the shop was built there. Did not know for whose benefit Vroman built it. He did not know that Vroman occupied it as tenant of anybody when he erected the building.

The Defendants then proved that on the 16th day of June, 1860, they entered into a written contract with Paige and Potter, then the owners of the land upon which said building was located, and agreed to pay therefor the sum of $2,500 on the execution of a good and sufficient deed therefor, and that the Defendants took possession of said land under said contract;

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that they were in possession under that contract at the time the shop was removed; that there were several other buildings on this lot at the time they bought, and the Defendants took possession of the whole lot and all the buildings, including this shop; that the Defendants subsequently received a deed for said premises, pursuant to the terms of their contract; that the Defendants have occupied all the premises since the contract to them.

The judge charged the jury that, as matter of law, the Plaintiff was entitled to recover. To which charge the counsel for the Defendants there and then duly excepted. The judge further charged that the only question for the jury to consider was the question of damages, and to this the Defendants also excepted.

I think the learned judge at the Circuit was in error in holding, as a matter of law, that upon this testimony the Plaintiff was entitled to recover. That testimony showed, in brief, that the Plaintiff had become the purchaser of a building erected upon land owned by the Defendants, and that the Defendants had taken possession of the building and removed it, as they clearly had a right to do if it was attached to the freehold, and passed under the contract and conveyance to them. That it did so pass is established by authority (Mott *v.* Palmer, 1 N. Y. 564). In that case Judge Bronson said: "The word land includes not only the soil, but everything attached to it, whether attached by the course of nature, as trees, herbage, and water, or by the hand of man, as buildings and fences. This is but common learning; and there is no more room for question that a grant of land, *eo nomine,* will carry buildings and fences, than there is that it will carry growing trees and herbage upon, or mine and quarries in the ground."

The cases relied upon to take this case out of this well-recognized and firmly established rule of law, do not apply to the facts as proven on the trial of this action.

In the first place it was not established that this building was erected upon any agreement between Vroman and the then owners of the fee of the land, that it was to be considered

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strictly a personal chattel. Second, it was not proven that the building was erected by a tenant, for the purposes of his trade and business, or that the relation of landlord and tenant ever existed between Vroman and the Defendants' grantors, or between them and the Plaintiff. The first proposition was necessary to be established to make applicable the doctrine of the case of Smith *v.* Benson (1 Hill, 176). In that case, Cowen, J., said. "Thus both parties agreed to consider it(the building in question) as in a state of severance from the freehold; and no one had ever thought of its being so fixed as to be irremovable. Primâ facie, such a building would be a fixture, and would not be removable. The legal effect of putting it on another's land would be to make it a part of the freehold. But the parties concerned may control the legal effect of any transaction between them by an express agreement. They have in effect stipulated that the placing this building on the ground should work nothing more toward changing its nature than if it had been the loose timber of the house, instead of the house itself. The law often implies an agreement of nearly the same character from the relation of lessor and lessee, or tenant and remainder-man; and surely, the parties may, by express agreement, do the same thing and even more."

Equally inapplicable is the doctrine of Ombony *v.* Jones (19 N. Y. Rep. 234), as the second proposition above stated was not established by proof. The rule to be gathered from the case is there stated thus by Judge Grover: "That a tenant may remove, during his term, all erections made by him for the purpose of trade that can be removed without injury to the land or something attached thereto."

But in the case at law no tenant sought to exercise such right during his term. There is an utter failure to establish the first foundation for invoking the aid of such a principle, viz., that the relation of tenant at any time existed. When that fact was proven, it then would have been needful to show that the building in question was erected by the tenant for the purposes of trade or his business, and that he exercised his right of removal during his term.

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Upon the facts proven upon this trial there can be no doubt that the Defendants were the owners of the building in controversy, and it follows that the Plaintiff is not entitled to recover its value. The learned judge erred in charging the jury that, as a matter of law upon the facts proven, the Plaintiff was entitled to recover. The judgment must be reversed and a new trial ordered, costs to abide the event.

PARKER, J.—If the building in question is to be deemed to have been a part of the realty, the Plaintiff was not entitled to recover for its appropriation by the Defendants.

It is undisputed that Vroman, who built it, was not the owner of the land on which it was built, either in fee or as a tenant for life or years; nor is there any evidence tending to show that he built it pursuant to any agreement or understanding whatever with the owner of the land. So far as appears, he was a trespasser in erecting it upon the land where it was placed.

Under this state of facts there can be no doubt that it became, when erected, a part of the land on which it was erected, and thenceforth real and not personal estate (Smith *v.* Benson, 1 Hill, 176; Miller *v.* Plumb, 6 Cow. 665; Ford *v.* Cobb, 20 N. Y. R. 344; Murdoch *v.* Gifford, 18 N. Y. R. 28! Snedeker *v.* Warring, 2 Kern, 170; Ombony *v.* Jones, 19 N. Y. R. 234). It was sufficiently fixed to the freehold (Smith *v.* Benson, *supra;* Goodrich *v.* Jones, 2 Hill, 142; Bishop *v.* Bishop, 11 N. Y. R. 123; Mott *v.* Palmer, 1 Coms. 564).

There can be no doubt that as between vendor and vendee it would be held to be real estate, and pass by the deed of the land. The same rule must apply as between these parties.

Nothing occurred after the erection that changed the property from real to personal. All that the Plaintiff swears to in reference to his interview with Defendant Reed, comes far short of producing such effect. It may be said that it shows an admission that Plaintiff was entitled to pay for the building. If any admission is shown it is not that Plaintiff was entitled to pay from Defendants, but from their grantors, which was

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equivalent to a claim of ownership, as between Defendants and such grantors.

What the Plaintiff says he told Luman Reed in regard to his conversation with John Reed is no evidence of such conversation with John, for he does not testify that he said it.

I am unable to see any legal ground to recover, and am of the opinion that the judgment appealed from should be reversed and a new trial ordered.

All concur except PORTER, J.

Reversed.

JOEL TIFFANY,
State Reporter.

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INDEX.

ACCOUNTING—Invalid Judgment—Executor 54
See EXECUTOR.

ACCOUNT RENDERED—*Account stated—Interest.*] Where an account has been rendered to which no exceptions are taken, it may be regarded as an account stated, upon which interest may be demanded.
CASE *v.* HOTCHKISS 285

ACTION, same cause of—Practice—Slander—Malicious Prosecution 278
See PRACTICE.

ACT OF CONGRESS, Pilot, 1852 297
See PILOTAGE.

ADDITION TO FUND *in charge of Commissioners does not release Sureties.*] An addition to the capital of the fund placed in charge of the Commissioners by Act of April 10, 1850, does not discharge the sureties of such Commissioners from liability on their official bond.
PEOPLE *v.* VILAS 209

ADMINISTRATOR'S POWER—Statute of Limitations—Code, § 110 226
See STATUTE OF LIMITATIONS.

ADVANCEMENT DISCHARGES ESTATE *of claim as Heir.*] Where the intestate in his lifetime had given to his son real estate as an advancement, which in value was equal to what would have been his share in his father's estate, such advancement discharges the estate of the intestate for all claims of the son or of his heirs, as heirs of the estate of the intestate.
PARKER *v.* MCCLUER 240

AGENCY OF INSURANCE COMPANIES—*What evidence of?*] Evidence that a party assuming to act as the agent of an Insurance Company, was authorized by the company to purchase, at their expense, a policy register in which to keep an account of his business for the company, is not sufficient to establish the general agency of such party.
STRINGHAM *v.* ST. NICHOLAS INSURANCE COMPANY .....e 334

AGENT, Conversion by—Property of Principal—Pleading 245
See PLEADING.

———, Endorsement of Negotiable Paper by—What defence precluded 322
See NEGOTIABLE PAPER.

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PAGE

APPEAL—*Evidence—Refusal to Charge.*] Where Defendant has procured Plaintiff's arrest on a charge of perjury, it is not error in an action thereon for false imprisonment and malicious prosecution, to allow Plaintiff, as a witness, to be questioned by his counsel concerning his innocence of the charge.

Any question intended to be raised in this court must be brought specifically to the notice of the court below.

FAY *v.* O'NEIL 185

2. APPEAL—*Ground of Objections must be stated to Referee.*] Where, upon a hearing before a referee, objections are taken to certain questions propounded to witnesses, without stating the ground of the objections, on an appeal such general objections cannot be made available upon review.

SHAW *v.* SMITH 238

3. ——— *No Review of Questions of Fact*—Code, § 264, 265.] Upon appeal, where a trial was had before a jury, there is no power in this Court, or in the General Term, to review the questions of fact. If there was any evidence upon which the finding of the jury could be sustained, their finding was conclusive.

PARKER *v.* JERVIS 88

4. ——— *Pleading—When determined sufficient.*] When a case has been in this Court on appeal and has been sent back to the Special Term for a new trial, this Court must necessarily have determined the pleadings to have been sufficient to sustain a judgment.

When the judgment has been reversed because the Court below improperly denied the ruling asked, it necessarily follows that the Court deemed the pleadings to be sufficient to entitle the party to the ruling sought.

NEW YORK AND NEW HAVEN RAILROAD COMPANY *v.* KETCHUM 116

5. ——— *Taxation of Costs—Mandamus—Correction of Case.*] An order of the General Term affirming an order of the Special Term denying a motion to retax costs and to correct the judgment roll, is not the subject of appeal to this Court.

Nor is an order of the General Term dismissing an appeal from an order of the Special Term refusing a mandamus, appealable.

Nor is an order dismissing an appeal from an order of Special Term denying motion to correct case, appealable to this Court.

HOE *v.* SANBORN 160

——— Laying out Highway—Referees—Powers of Supreme Court 19

See LAYING OUT HIGHWAY.

APPEALS IN CAPITAL CASES—Court of Oyer and Terminer.. 1

See COURT OF OYER AND TERMINER.

ASSENT OF TOWN TAX-PAYERS *to Bonds—Laws* 1852, *ch.* 375.] The affidavit filed with the clerk pursuant to the 2d Section of Ch. 375 of Laws of 1852, is not to be taken as evidence of the assent or the tax-payers of the town, required by the act, in favor of a bonâ fide holder of bonds issued under its provisions.

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PAGE

And when it is found by the Court that the necessary assent of the tax-payers was not given, the bonds issued possess no validity.
FIEDLER *v.* MEAD 109

ASSESSMENT ON BANK STOCK—*No reduction for Debts—Laws* 1866, *Ch.* 761.] A shareholder in a banking association who has been assessed upon the value of his shares therein under the Act of 1866 (Ch. 761), is not entitled at the hands of the assessor to a reduction of such valuation on account of his debts.
CAGGER *v.* DOLAN 118

ASSIGNED BOND, Effect on, of Delivery of Mortgage as Collateral 63
See MORTGAGE.

ASSIGNEE OF A CHOSE IN ACTION not negotiable, takes subject to all Equities 221
See NON-NEGOTIABLE CHOSE.

BANK, Drawing Money in—Injunction—Contempt 270
See CONTEMPT.

——— STOCK, Assessment on—No reduction for debts—Laws 1866, ch. 761 118
See ASSESSMENT.

BAWDY HOUSE—Nuisance—Destruction by mob—Recovery against County 273
See NUISANCE.

BEARER, Fictitious Payee on Negotiable Paper construed as 201
See NEGOTIABLE PAPER.

BOAT, Dropping Chain of, before securing—Ferry Company—Negligence 313
See NEGLIGENCE. 1.

BOND, Assigned, Effect on—Delivery of Mortgage as Collateral 63
See MORTGAGE.

BONDS, Assent of Town Tax-payers to—Laws 1852, ch. 375 109
See ASSENT.

BOTTOMRY LOAN, Suspension of Insurance to secure 167
See INSURANCE.

BUILDING erected by Trespasser passes with Realty—When? 355
See TRESPASSER.

BURDEN OF PROOF—Corporation—Evidence—Issue of Spurious Stock 96
See EVIDENCE. 1.

CAPITAL CASES, Appeals in—Court of Oyer and Terminer 1
See COURT OF OYER AND TERMINER.

CAUSE OF ACTION, Same—Practice—Slander—Malicious Prosecution 278
See PRACTICE.

CHARGE, Refusal to—Evidence—Appeal 185
See APPEAL. 1.

CENTRE OF STREET, Lots sold by Map are bounded by 253
See LOTS.

Digitized by Google

PAGE.

CHAIN OF BOAT, Dropping before securing—Ferry Company—Negligence 313
See NEGLIGENCE. 1.
————, Request to—Nonsuit—Evidence 203
See EVIDENCE. 7.
CLAIM AS HEIR, Advancement discharges Estate of 240
See ADVANCEMENT.
CODE:
Sections 264, 265 88
See APPEAL. 3.
Section 385 266
See COSTS.
Section 110 226
See STATUTE OF LIMITATIONS.
COHABITATION—Cruel Treatment—Condonation 103
See CONDONATION.
COLLATERAL, Delivery of Mortgage as—Effect on Assigned Bond 63
See MORTGAGE.
COMMISSIONERS, Addition to fund in charge of, does not release Sureties 209
See ADDITION TO FUND.
COMMISSIONER'S REPORT on Street Openings—Conclusive when? 288
See STREET OPENINGS.
COMPANIES, INSURANCE, Agency of—What Evidence of? 334
See AGENCY OF INSURANCE COMPANIES.
CONDONATION—*Cruel Treatment—Cohabitation.*] In an action for for a separation from bed and board on account of cruel and inhuman treatment, the fact of continued cohabitation after the acts complained of, is not conclusive evidence of condonation or forgiveness, as in cases where the cause is adultery.
REYNOLDS *v.* REYNOLDS 103
CONSIDERATION ON DEBT, Note without 231
See NOTE.
CONSUMMATION OF CONTRACT, Time of—Letter or Telegram 248
See CONTRACT. 2.
CONTEMPT—*Injunction—Drawing Money in Bank.*] A Defendant enjoined from disposing of his property and effects, having money in bank, which he draws out upon his checks, is thereby guilty of contempt, and may be punished accordingly.
NOEL *v.* KINGSLAND 270
CONTRACT *must be performed entire—When?*] Where there was a contract to furnish, cut, fit, and put down in defendant's house, the carpets and oil-cloths at a stipulated price, the contract is entire; and to entitle the Plaintiff to recover he must perform the whole contract in a skillful and workmanlike manner.
If he fail in respect to one or two of the rooms, he cannot recover as to any.
HUSTED *v.* CRAIG 313

Digitized by Google

PAGE

2. ——— *Time of Consummation—Letter or Telegram.*] Where there is a proposition on the one part, and an acceptance on the other, manifested by distinct overt acts, as the sending of a letter, or a telegram, the contract is consummated from the time such acceptance was thus signified.
TREVOR, JR., *v.* WOOD 248

CONVERSION BY AGENT—Property of Principal—Pleading 245
See PLEADING.

CORPORATION—Evidence—Issue of Spurious Stock—Burden of Proof 96
See EVIDENCE. 1.

——— Municipal—Liable for obstruction in its sewers .. 317
See MUNICIPAL CORPORATION.

CORRECTION OF CASE—Appeal—Taxation of Costs—Mandamus 160
See APPEAL. 5.

COSTS, TAXATION OF—Mandamus—Correction of Case—Appeal 160
See APPEAL. 5.

COSTS—*Time of Offer—Code,* § 385.] An offer to permit the Plaintiff to take judgment under § 385 of the Code of Procedure must be construed as an offer in the action at the time it is served, in its then condition; and has no reference to the case when changed in its condition by future proceedings.
If the Defendant subsequently set up a counter-claim, which is also extinguished by the subsequent judgment of the Plaintiff, and which together with the judgment amount to more than the Defendant offered to permit judgment for, the Plaintiff will be entitled to costs.
TOMPKINS *v.* IVES 266

COUNTY, RECOVERY AGAINST, for Destruction of Bawdy house by Mob—Nuisance 273
See NUISANCE.

COURT OF OYER AND TERMINER—*Appeals in Capital Cases—Laws* 1855, *Ch.* 337. *Laws* 1858, *Ch.* 330.] The act of 1855 (Laws 1855, ch. 337, as amended by Laws 1857, ch. 330) has no application to trials in Courts of Oyer and Terminer.
It applies only to cases where there has been a conviction for a capital offence in the General Sessions of the Peace in and for the City and County of New York.
Only in such cases, therefore, can the Court of Appeals grant new trials, whether or not exceptions have been taken in the Court below.
MCKEE *v.* PEOPLE 1

CROSSING, RAILROAD—Negligence—No signal 46
See NEGLIGENCE. 4.

CRUEL TREATMENT—Cohabitation—Condonation 103
See CONDONATION.

CUSTOMS OF PLACE, Insurers presumed to know 189
See INSURERS.

Digitized by Google

PAGE

DAMAGES TO REAL ESTATE—Evidence—Title..... 307
See EVIDENCE. 2.

DEBT AGAINST STATE—Set-off—Power of State Prison Agent 10
See SET-OFF.

———, past due—Negotiable Paper—When held for value..... 352
See NEGOTIABLE PAPER. 1.

———, Note without consideration on..... 231
See NOTE.

DEBTS, no reduction of Assessment on Bank Stock for—Laws 1866, Ch. 761 118
See ASSESSMENT.

DEED may be proved Mortgage—Evidence..... 224
See EVIDENCE. 3.

DEFENCE, Usury a Personal..... 257
See USURY.

———— What precluded—Endorsement of Negotiable Paper by Agent 322
See NEGOTIABLE PAPER. 2.

DELIVERY OF MORTGAGE as Collateral—Effect on Assigned Bond 63
See MORTGAGE.

DESTRUCTION OF BAWDY HOUSE by Mob—Nuisance—Recovery against County 273
See NUISANCE.

DISCHARGES ESTATE, Advancement, of claim as Heir..... 240
See ADVANCEMENT.

DIVERSION OF STREAM, Duty of Railroad Company on..... 26
See RAILROAD COMPANY. 1.

DOCKET—Justices' Judgment—Execution—Issuable by whom?.... 66
See JUSTICES' JUDGMENT.

DRAWING MONEY IN BANK—Injunction—Contempt..... 270
See CONTEMPT.

DROPPING CHAIN before securing Boat—Ferry Company—Negligence 313
See NEGLIGENCE. 1.

DUTY OF RAILROAD COMPANY on Diversion of Stream..... 26
See RAILROAD COMPANY. 1.

ENDORSEMENT OF NEGOTIABLE PAPER by Agent—What defence precluded 322
See NEGOTIABLE PAPER. 2.

ENDORSER OF PROMISSORY NOTE, Notice to—What sufficient 75
See PROMISSORY NOTE. 2.

EQUITIES, Assignee of a chose in action not negotiable takes subject to all 221
See NON-NEGOTIABLE CHOSE.

Digitized by Google

PAGE

EQUITY—*Statute of Limitations—2 R. S.* 114, § 9.] A Court of Equity will not allow proceedings for distribution of an estate by persons having a demand thereon, to be instituted after the expiration of the time allowed by law.
CLARK *v.* FORD 22

ESTATE, ADVANCEMENT DISCHARGES, of claim as Heir.... 240
See ADVANCEMENT.

——— LIFE—Lease—Trespass—When action maintainable?..... 346
See LIFE ESTATE.

EVIDENCE—Appeal—Refusal to charge..... 185
See APPEAL. 1.

——— *Corporation—Issue of Spurious Stock—Burden of Proof.*] In an action against the defendant for fraud committed by issuing spurious stock in a coal company, of which he was the President, to the Plaintiff, it is incumbent on the Plaintiff to prove that the stock issued to him was spurious; and having proved that his stock was issued to him after the full amount of the company's stock had been issued, it is incumbent on the Defendant to prove that such stock was issued on the surrender of genuine certificates of the company's stock.
BRUFF *v.* MALI 96

2. ——— *Damages to Real Estate—Title.*] In an action by the vendor against the vendee of certain real estate, for damages done to the freehold while the vendee was in possession under a contract of purchase, it is competent for the vendee to allege and prove that the vendor never had any estate in the land, or in the freehold alleged to have been injured.
SMITH *v.* BABCOCK 307

3. EVIDENCE—*Deed may be proved Mortgage.*] It is competent to prove that a deed absolute upon its face is in fact designed as a mortgage.
VANDUSEN *v.* WORRELL 224

4. ——— *Expert—Quantity of Grass.*] When material, it is competent to inquire of a witness his opinion as to the quantity of grass growing upon an acre of land, he being acquainted with the land and the grass thereon, and being familiar with the subject of estimating the quantity of grass growing upon land.
The facts upon which such an opinion must be based can be communicated in no other way to the minds of the jury; it is the best evidence which is capable of being given upon such subject.
PHILLIPS *v.* TERRY 235

5. ——— *Negligence—Railroad Company.*] In an action for negligently causing the death of a person, the burden of establishing the negligent causing of the death is upon the plaintiff; and it is error for the Judge to charge the jury, if the death of the party occur on defendants' premises while defendants are in exclusive occupation thereof, that, as a matter of law, the defendants are liable, unless they can explain the cause of such death.
CURRAN *v.* WARREN CHEMICAL AND MANUFACTURING CO..... 59

Digitized by Google

PAGE

6. ——— *Objections to Pleadings or Proofs, when to be taken.*] Objections to the pleadings or the proofs must be taken at the trial to be available on review.
ROSEBROOKS *v.* DINSMORE 265

7. ——— *Request to Charge—Nonsuit.*] Where, on a trial before a jury, the Judge assumes that a fact is proved, if the party desires such question to be submitted to the jury, he should so request it to be done; and not doing so, he cannot except on that account.
Where there is evidence tending to prove or disprove material portions of the Plaintiff's claim or Defendant's defence, the Court can neither nonsuit the Plaintiff, nor direct a verdict for Defendant.
MALLORY *v.* TIOGA RAILROAD COMPANY 203

——— OF AGENCY of Insurance Companies—What? 334
See AGENCY OF INSURANCE COMPANIES.

EXECUTION—Issuable by whom—Justices' Judgment—Docket... 66
See JUSTICES' JUDGMENT.

EXECUTOR—*Invalid Judgment—Accounting—Laws* 1849, *Ch.* 226.] In an action by a judgment creditor, seeking to compel an executor to account before a Surrogate, with a view to enforce the collection of a judgment obtained under the Act of 1849 (ch. 226), seeking to enforce the responsibility of Stockholders of Banks, &c., the right of such creditor to maintain such proceeding before the Surrogate depends upon the validity of the judgment under which he claims.
Where it appears from the record of such jugdment, that the facts necessary to give the Court jurisdiction had not been found, the ascertainment of which was a condition precedent to the rendering of such judgment, the judgment itself must be deemed invalid, and the supposed rights of the creditor under it cannot be maintained.
DIVEN *v.* LEE 54

EXPERT—Evidence—Quantity of Grass 235
See EVIDENCE. 4.

FERRY COMPANY—Negligence—Dropping chain before securing Boat 313
See NEGLIGENCE. 1.

FICTITIOUS PAYEE on Negotiable Paper construed as Bearer.... 201
See NEGOTIABLE PAPER. 3.

FRAUDS, STATUTE OF—Trustee 350
See STATUTE OF FRAUDS.

FRONT PLATFORM—Railroad Company—Negligence—Minor.... 49
See NEGLIGENCE. 3.

FUND IN CHARGE OF COMMISSIONERS, additions to, does not release Sureties 209
See ADDITION TO FUND.

GROUND OF OBJECTIONS to questions must be stated to Referee 238
See APPEAL. 2.

Digitized by Google

PAGE

HEIR, Advancement discharges Estate of claim as..... 240
See ADVANCEMENT.

HIGHWAY, LAYING OUT—Appeal—Referees—Powers of Supreme Court 19
See LAYING OUT HIGHWAY.

HOUSE, BAWDY—Nuisance—Destruction by Mob—Recovery against County 273
See NUISANCE.

INFORMATION REFUSED invalidates Tax Sales of Land..... 206
See TAX SALES.

INJUNCTION—Contempt—Drawing Money in Bank..... 270
See CONTEMPT.

INSURANCE AGENCY—What Evidence of?..... 334
See AGENCY OF INSURANCE COMPANIES.

——— POLICY—Non-payment of Note for premium—When void 324
See POLICY OF INSURANCE.

——— SUSPENDED *to secure Bottomry Loan.*] When an Insurance Company, having a right to loan upon bottomry, and upon bond and mortgage, have already insured a vessel in the sum of three thousand dollars, and are unwilling to take a greater risk upon the same, are applied to for a loan upon bottomry by the owners of the vessel, it is competent for said Company upon an agreement between the parties to suspend an amount of the risk contained in the policy equal to the amount of the loan sought upon bottomry, during the bottomry loan, and to make the bottomry loan as desired.
NORTHWESTERN INSURANCE COMPANY *v.* FORWARD..... 167

INSURERS *presumed to know Customs of Place.*] Marine insurers are bound to know the custom of the place where they effect their insurance, and the law presumes they do know such custom, and have made their contracts in reference thereto.
HARTSHORNE *v.* UNION MUTUAL INSURANCE COMPANY..... 189

INTEREST—Account rendered—Account stated..... 285
See ACCOUNT RENDERED.

——— AND INCOME on Legacies, begin when—Legacies, when Payable 31
See LEGACIES.

INTEREST of Master of no special value..... 172
See MASTER'S INTEREST.

ISSUE OF SPURIOUS STOCK—Burden of Proof—Evidence—Corporation 96
See EVIDENCE. 1.

INVALID JUDGMENT—Executor—Accounting..... 54
See EXECUTOR.

JUDGMENT, INVALID—Executor—Accounting 54
See EXECUTOR.

Digitized by Google

PAGE

JUSTICE'S JUDGMENT—*Docket—Execution—Issuable by Whom?*] When the judgment of a Justice of a District Court has been docketed with the Clerk of the Court of Common Pleas, the attorney, and not the Clerk of the County, is the proper person to issue the execution.
BRUSH *v.* LEE 66

LAND, TAX-SALES OF—Invalid if Information Refused 206
See TAX-SALES.

LAWS:
1849, Ch. 226 54
See EXECUTOR.
1852, Ch. 375 109
See ASSENT.
1853, Ch. 467 297
See PILOTAGE.
1857, Ch. 628 8
See NON-RESIDENT.
1866, Ch. 761 118
See ASSESSMENT.

LAYING OUT HIGHWAY—*Appeal—Referees—Powers of Supreme Court.*] Where proceedings have been taken under the statute to lay out a public highway, and an appeal from the order of the Commissioners has been taken according to law, and Referees have been appointed by the County Judge to hear and determine the appeal, and the Referees have affirmed the order of the Commissioners laying out the road, and the proceedings have been brought before the Supreme Court on a common-law *certiorari*, the Supreme Court have only authority to affirm or reverse such order of the Referees.

If the Court proceed further to vacate the order appointing such Referees, and order the appointing of a new board of Referees by the County Judge, &c., it transcends its authority, and such additional order is erroneous.
ROBINSON *v.* FERRIS 19

LEASE—Life Estate—Trespass—When action maintainable?——— 346
See LIFE ESTATE.

LEASES IN FEE—Will—Words of Perpetuity 92
See WILL.

LEAVING POST-HOLES in Street open at Night—Negligence 263
See NEGLIGENCE. 2.

LEGACIES—*When payable—Interest—Income—Begin when.*] Where a legacy is given with directions that interest and income be applied to use of legatee, the legatee is entitled to interest from death of testator.
COOK *v.* MEEKER 31

LETTER OR TELEGRAM—Time of Consummation of Contract .. 248
See CONTRACT. 2.

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PAGE

LIABILITY OF MUNICIPAL CORPORATION for obstruction in its Sewers 317
See MUNICIPAL CORPORATION.

LIFE ESTATE—*Lease—Trespass—When action maintainable.*] The Plaintiff having a life estate in the premises and leasing the same from year to year, cannot maintain an action in the nature of trespass for an injury done to the possession during the continuance of the lease.
TOBIAS *v.* COHN 346

LIQUOR LICENSE—Non-Resident—Laws 1857, Ch. 628 8
See NON-RESIDENT.

LIMITATIONS, STATUTE OF—Administrator's power—Code, § 110 226
See STATUTE OF LIMITATIONS.

LOAN, BOTTOMRY, Suspension of Insurance to secure..... 167
See INSURANCE.

LOTS SOLD BY MAP *are bounded by Centre of Street.*] Where lots are sold by number designated on a map of the plat, and by such map such lots abut on a strip of land described on such map as a "street," or "park," the purchaser of such lots is to be deemed as being bounded by the centre of said strip or "street."
PERRIN *v.* NEW YORK CENTRAL RAILROAD COMPANY..... 253

MALICIOUS PROSECUTION—Slander—Practice—Same cause of action 278
See PRACTICE.

MANDAMUS—Correction of Case—Appeal—Taxation of Costs.... 160
See APPEAL. 5.

MAP, LOTS SOLD BY, are bounded by Centre of Street..... 253
See LOTS.

MASTER'S INTEREST—*No Special Value.*] The doctrine that the owning of a share in a vessel by the Master or Captain thereof, constitutes such share one of special value and authority as the "sailing master's interest or share," repudiated.
There is no such distinction as to the value of shares, whether owned by the Captain or citizen.
WARD *v.* RUCKMAN..... 172

MINOR—Negligence—Railroad Company—Front Platform..... 49
See NEGLIGENCE. 3.

MOB, DESTRUCTION BY, of Bawdy House—Nuisance—Recovery against County 273
See NUISANCE.

MONEY IN BANK, Drawing—Injunction—Contempt..... 270
See CONTEMPT.

MORTGAGE, Deed may be proved—Evidence..... 224
See EVIDENCE. 3.

MORTGAGE—*Delivery as Collateral.—Effect on Assigned Bond.*] The mere delivery of a mortgage, given to secure the payment of a bond, by the mortgagee to a creditor as collateral security for a

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PAGE

debt owing by the mortgagee, does not pass any interest to the mortgagee, as against one holding by assignment the bond secured thereby.

MERRITT *v.* BARTHOLICK 63

MUNICIPAL CORPORATION—*Liable for obstruction in its Sewers.*] A municipal corporation is liable for damages sustained by a Plaintiff caused by obstruction occasioned to the flow of water in the public sewer, by reason of which the Plaintiff's premises became flooded by water thrown back through his, Plaintiff's, drain.

BARTON *v.* CITY OF SYRACUSE 317

NEGLIGENCE—*Ferry Company—Dropping Chain before securing Boat.*] The dropping of the chain guarding the passage way on a ferry-boat, before the boat is properly secured to the bridge, thereby signifying to the passengers that everything is ready for them to pass off, is such an act of negligence on the part of the company as to render them liable for damages occasioned by failure to have the boat properly secured to the bridge.

FERRIS *v.* UNION FERRY CO. 313

2. ———— *Leaving Post-holes in Street open at Night.*] A Defendant is liable for damages resulting to Plaintiff for digging post-holes on the line of his lot and the street, extending into the travelled part of the sidewalk, and leaving them open during the night, without any guard or protection, by reason of which the Plaintiff stepped into the hole and was injured.

WRIGHT *v.* SAUNDERS 263

3. ———— *Railroad Company—Front Platform—Minor.*] It is negligence on the part of a railroad company to so overcrowd their car as to compel a passenger to stand on the front platform, from which he was thrown and fatally injured.

It is not error for the Court to refuse to charge that the company owed no more protection or care to a boy of nine years of age than to an adult.

SHERIDAN *v.* BROOKLYN CITY AND NEWTOWN R. R. CO. 49

4. ———— *Railroad Crossing—No Signal.*] If, on approaching a crossing by a train of cars, no signal be given, as the ringing of the bell or the blowing of the whistle, by the agents or servants of the company, it is guilty of negligence; and where there is conflicting evidence on that point, the question is to be submitted to the jury; and their finding therein is conclusive.

RENWICK *v.* N. Y. CENTRAL R. R. CO. 46

———— Railroad Company—Evidence 59

See EVIDENCE. 5.

———— Riding on Platform—Railroad Company 105

See RAILROAD COMPANY. 2.

NEGOTIABLE PAPER—*Debt past due—When held for value.*] A party taking negotiable paper before maturity, in payment of a debt past due, is thereby constituted a holder for value.

DAY *v.* SAUNDERS 352

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PAGE

2. ——————— *Endorsement by Agent—What defense precluded.*] Where the agents of the Defendants had been accustomed to endorse paper in the name of the Defendants, and to get the same discounted for their benefit, and had endorsed in their names, and procured to be discounted the note in question, the Defendants will be precluded from setting up that such note being accommodation paper, their agent was not authorized to endorse the same. The Plaintiffs had a right to presume that it was regular business paper.
BANK OF AUBURN *v.* PUTNUM 322

3. NEGOTIABLE PAPER—*Fictitious Payee construed as Bearer.*] Where negotiable paper is made payable to a fictitious payee, it is to be construed as made payable to bearer.
MECHANICS' BANK OF CITY OF NEW YORK *v.* STRAITON 201

NON-NEGOTIABLE CHOSE—*Assignee takes subject to all Equities.* The assignee of a chose in action not negotiable takes subject to all equities, and can acquire no greater or other rights than those possessed by his assignor.
BLYDENBURGH *v.* THAYER 221

NON-PAYMENT OF NOTE on Policy of Insurance—When void 324
See POLICY OF INSURANCE.

NON-RESIDENT—*Liquor License—Laws* 1857, *Ch.* 628.] A license to sell intoxicating liquors in a town of which the licensee is not an inhabitant, affords him no protection for the sale of such liquors in such town.
PEOPLE *v.* DAVIS 8

NONSUIT—Evidence—Request to charge 203
See EVIDENCE. 7.

NO REDUCTION OF ASSESSMENT on Bank Stock for debt—Laws 1866, Ch. 761 118
See ASSESSMENT.

NOTE FOR COLLECTION, though drawn against Receiver of, not Purchaser for value 302
See RECEIVER.

——————— PREMIUM, on Policy of Insurance, Non-payment of —When void 324
See POLICY OF INSURANCE.

———, PROMISSORY—Endorser not charged—Recovery after Payment 71
See PROMISSORY NOTE. 1.

——————— What sufficient notice to endorser 75
See PROMISSORY NOTE. 2.

——— WITHOUT CONSIREDATION *on Debt.*] The receiving of a note on a precedent debt without surrounding or relinquishing any security or right in regard to it, does not constitute the party so receiving it a holder thereof for value.
LAWRENCE *v.* CLARK 231

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PAGE

NOTICE TO ENDORSER of Promissory Note, What sufficient.. 75
See PROMISSORY NOTE. 2.

NUISANCE—*Bawdy House—Destruction by Mob—Recovery against County.*] A house kept as a house of ill-fame or bawdy house, and as a resort for thieves and other disreputable persons, although a common nuisance, and subject to indictment does not constitute such negligence on the part of the keeper thereof as to prevent a recovery against the county when the same has been destroyed by mob violence.
ELY *v.* SUPERVISORS OF NIAGARA COUNTY..... 273

OBJECTIONS, Ground of, to questions must be stated to Referee.. 238
See APPEAL. 2.

——————to Pleadings or proof, when to be taken—Evidence 265
See EVIDENCE. 6.

OBSTRUCTION IN SEWERS, Municipal Corporation liable for.. 317
See MUNICIPAL CORPORATION.

OFFER, TIME OF—Costs—Code, § 385 266
See COSTS. 2.

OPENING OF STREETS—Commissioners' Report—Conclusive When? 288
See STREET OPENINGS.

OYER AND TERMINER, Court of—Appeals in Capital Cases.... 1
See COURTS OF OYER AND TERMINER.

PAPER, NEGOTIABLE—Debt past due—When held for value.... 352
See NEGOTIABLE PAPER. 1.

——————————Endorsement by Agent—What defence precluded 322
See NEGOTIABLE. 2.

——————————Fictitious Payee construed as Bearer... 201
See NEGOTIABLE PAPER. 3.

PERFORMANCE OF CONTRACT ENTIRE—When? 331
See CONTRACT. 1.

PERSONAL DEFENCE, Usury a 257
See USURY.

PERSONAL PROPERTY—Statute of Uses and Trusts 348
See STATUTE OF USES AND TRUSTS.

PERPETUITY, WORDS OF—Leases in Fee—Will 92
See WILL.

PILOTAGE——*Act of Congress of* 1852. *Laws* 1853, *Ch.* 467.] The Act of Congress of 1852 (Sess. Laws, p. 921), is applicable only to the class of pilots attached to particular vessels, and charged with the duty of navigating them on the voyage, and does not supersede the authority of the States to regulate pilotage at their own ports for the protection of general commerce.

A licensed pilot of the port of Ney York by the way of Sandy Hook, is entitled to "off-shore pilotage," having offered his services at a distance from port entitling him thereto.
CISCO *v.* ROBERTS 297

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PAGE

PLATFORM, FRONT—Railroad Company—Negligence—Minor... 49
See NEGLIGENCE. 3.

——————— Riding on—Railroad Company—Negligence 105
See RAILROAD COMPANY.

PLEADING—*Conversion by Agent—Property of Principal.*] Where an agent converts the property of his principal into money in pursuance of his agency, and applies the money to his own use, in an action by the principal to recover the same ,it is no defence for the agent to set up that the property converted was not, in eqnity, that of the principal; and if he sets up facts of that character in his answer, the Court, on motion, may strike out that portion of the answer as irrelevant.
AUBREY *v.* FISKE 245

PLEADINGS—Appeal—When determined sufficient 116
See APPEAL. 4.

——————— OR PROOFS, when objections to be taken to—Evidence 265
See EVIDENCE. 6.

POLICY OF INSURANCE—*Non-payment of Note for premium—When void.*] A condition in a policy that if the note given for the premium is not paid at maturity, the policy shall be void, is a valid and binding one, and the note being dishonored, the policy thereby becomes void.
WALL *v.* HOME INS. CO. 324

POST-HOLES IN STREET open at Night—Negligence 263
See NEGLIGENCE. 2.

POWER OF ADMINISTRATOR—Statute of Limitations—Code, § 110 226
See STATUTE OF LIMITATIONS.

POWERS OF STATE PRISON AGENT—Debt against State—Set-off 10
See SET-OFF.

——————— SUPREME COURT—Laying out Highway—Appeal—Referees 10
See LAYING OUT HIGHWAYS.

PRACTICE—*Slander—Malicious Prosecution—Same cause of Action.*] Where an action of slander is prosecuted on a charge made for the purpose of causing the arrest of a party, and said party has prosecuted to judgment an action for malicious prosecution for the arrest thus made, such action for slander cannot be maintained, on the principle that a party is not entitled to two recoveries for the same cause of action.
ROCKWELL *v.* BROWN 278

PREMIUM ON POLICY OF INSURANCE, Non-payment of Note for—When void 324
See POLICY OF INSURANCE.

PRINCIPAL, PROPERTY of—Conversion by Agent—Pleading.... 245
See PLEADING.

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PAGE

PRISON AGENT, STATE, Powers of—Debt against State—Set-off 10
See SET-OFF.

PROMISSORY NOTE—*Endorser not charged—Recovery after Payment.*] When an endorser, who has not been charged, pays a protested note to the holder under a mistaken idea, communicated by the holder, that he has been charged, he may recover back the money paid.

When the Plaintiff had been nonsuited by the Court, in an action tried before a jury, and the Judge, in doing so had ignored entirely evidence offered by Plaintiffs, a general exception to the nonsuit was sufficient to enable the appellate Court to refer to the testimony to see if a nonsuit was properly ordered.

LAKE *v.* ARTISANS' BANK 71

2.——————— *What sufficient Notice to Endorser.*] All that is essential to be communicated to an endorser to bind him as such, is that the note endorsed by him has not been paid at maturity; that it has been presented and protested for non-payment; together with a sufficient description to identify the note.

ARTISANS' BANK *v.* BACKERS 75

PROOF, BURDEN OF—Corporation—Evidence—Issue of Spurious Stock 96
See EVIDENCE. 1.

PROOFS OR PLEADINGS, when objection to be taken—Evidence 265
See EVIDENCE. 6.

PROPERTY OF PRINCIPAL—Conversion by Agent—Pleading... 245
See PLEADING.

————, PERSONAL—Statute of Uses and Trusts 348
See STATUTE OF USES AND TRUSTS.

PROSECUTION, MALICIOUS—Practice—Slander—Same cause of Action 278
See PRACTICE.

PURCHASE OF TRUST PROPERTY by Trustee in good faith... 145
See TRUSTEES.

QUANTITY OF GRASS—Evidence—Expert 235
See EVIDENCE. 4.

QUESTIONS OF FACT ON APPEAL, no Review of 88
See APPEAL. 3.

RAILROAD COMPANY—*Duty of, on Diversion of Stream.*] When a railroad company, in the construction of its road, finds it necessary to change the channel of a stream, and thus divert its course; and, for that reason, constructs a new channel to restore and preserve the stream in its former usefulness to owners of land through which it passed; such company is not only bound to construct such new channel, but is also bound to keep it in a suitable and proper condition, so as not only to

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PAGE

restore but to preserve the stream in its former usefulness as near as practicable.

COTT *v.* LEWISTON R. R. Co. 26

2. ——————— *Negligence—Riding on Platform.*] The law requires of those engaged in the carrying of passengers, the exercise of such care on their part, and the part of their servants, as will ensure the safe carriage of such passengers, so far as their safety depends upon the diligence and care of those engaged in such business.

A passenger standing upon the front platform of a street railroad car, because of the crowded condition of the car, and paying his fare at the request of the conductor, is not to be deemed guilty of negligence for occupying such position.

CLARK *v.* EIGHTH AVENUE R. R. Co. 105

——————— Evidence 59

See EVIDENCE. 5.

——————— Front Platform—Negligence—Minor.... 49

See NEGLIGENCE. 3.

——— CROSSING—Negligence—No Signal 46

See NEGLIGENCE. 4.

REAL ESTATE, DAMAGES to—Evidence—Title 307

See EVIDENCE. 2.

REALTY, Building erected by Trespasser passes with 355

See TRESPASSER.

RECEIVER OF NOTE *for collection, though drawn against, not Purchaser for Value.*] A banker, receiving from another notes for collection, obtains no better title to them or their proceeds than the remitting bank had, unless such collecting bank becomes a purchaser for value without notice of any defect in title.

Merely having a balance against the remitting bank,, for which it had refrained from drawing, according to custom between such banks, relying upon such collection to balance the same, does not constitute the collecting bank a purchaser for value.

COMMERCIAL BANK OF CLYDE *v.* MARINE BANK 302

RECOVERY AGAINST COUNTY for Destruction of Bawdy house by Mob—Nuisance 273

See NUISANCE.

——— OF PROMISSORY NOTE after Payment—Endorser not charged 71

See PROMISSORY NOTE, 1.

REDUCTION OF ASSESSMENT on Bank Stock for Debt, No—Laws 1866, Ch. 761 118

See ASSESSMENT.

REFEREE, Ground of objection to question must be stated to Referee 238

See APPEAL. 2.

REFEREES—Appeal—Laying out Highway—Powers of Supreme Court 19

See LAYING OUT HIGHWAY.

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PAGE

REFUSAL TO CHARGE—Evidence—Appeal 185
See APPEAL. 1.

REPORT OF COMMISSIONERS on Street Openings—Conclusive When? 288
See STREET OPENINGS.

REQUEST TO CHARGE—Nonsuit—Evidence 203
See EVIDENCE. 7.

REVIEW OF QUESTIONS of Fact on Appeal, No 88
See APPEAL. 3.

RIDING ON PLATFORM—Negligence—Railroad Company 105
See RAILROAD COMPANY. 2.

SALES OF LAND FOR TAXES—Invalid if Information Refused . 206
See TAX SALES.

SAME CAUSE OF ACTION—Practice—Slander—Malicious Prosecution 278
See PRACTICE.

SET-OFF—*Powers of State Prison Agent—Debt against State.*] Money borrowed by the State Prison at Sing Sing of a Bank for the purpose of purchasing supplies of food, &c., for the prisoners, does not constitute a debt against the State.

The agent of the Prison is not authorized to borrow money on the credit of the State.

PEOPLE *v.* BRANDRETH 10

SEWERS, Municipal Corporations liable for obstructions in 317
See MUNICIPAL CORPORATIONS.

SIGNAL, NO—Railroad Crossing—Negligence 46
See NEGLIGENCE. 4.

SLANDER—Malicious Prosecution—Same cause of action—Practice 278
See PRACTICE.

SPURIOUS STOCK, Issue of—Burden of Proof—Evidence—Corporation 96
See EVIDENCE. 1.

STATE PRISON AGENT, Powers of—Debts against State—Set-off 10
See SET-OFF.

STATUTE OF FRAUDS—*Trustee.*] A party purchasing and taking title to property under an agreement to hold the same for the benefit of the party employing him thus to purchase and hold, cannot avail himself of the provisions of the statute for the prevention of frauds, to perpetrate a fraud by holding the same for his own benefit.

He becomes a trustee and holds for the benefit of the party under his agreement.

SANFORD *v.* NORRIS 350

——————— LIMITATIONS—*Administrator's power,* Code, § 110.] A payment upon a note of the intestate barred by the Statute of Limitations during his lifetime, by his administrator, does not take the same from under the statute.

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PAGE

The administrator has no authority to bind the estate by any such implied or express promise.
McLaren *v.* McMartin 226

——————— Equity 22
See Equity.

——————— USES AND TRUSTS—*Personal Property.*] The Statute of Uses and Trusts respecting lands, dones not apply to trusts created in respect to personal property.
Brown *v.* Vaughan 348

——————— 2 R. S., 114, § 9 22
See Equity.

STOCK, BANK, Assessment on—No Reduction for debts—Laws 1866, Chap. 761 118
See Assessment.

——— SPURIOUS, Issue of—Burden of Proof—Evidence—Corporation 96
See Evidence. 1.

STREET, LEAVING POST-HOLES IN, open at night—Negligence See Negligence. 2..... 263

——————LOTS SOLD BY MAP are bounded by Centre of 253
See Lots.

——————OPENINGS—*Commissioners' Report—Conclusive when?*] The report of the commissioners appointed by the Supreme Court to assess damages, &c., sustained by persons whose lands have been taken for purpose of streets in the city of New York, when confirmed by the Supreme Court, is conclusive, and no appeal lies from such determination.
King *v.* Mayor of New York 288

SUFFICIENT NOTICE to Endorser of Promissory Note, What.. 75
See Promissory Note. 2.

SUSPENSION OF INSURANCE to secure Bottomry Loan..... 167
See Insurance.

SUPREME COURT, POWERS OF—Appeal—Referees—Laying out Highway 19
See Laying out Highway.

SURETIES NOT RELEASED by addition to Fund in charge of Commissioners 209
See Addition to Fund.

TAXATION OF COSTS—Mandamus—Correction of Case—Appeal 160
See Appeal. 5.

TAX-PAYERS, TOWN, ASSENT OF,, to Bonds—Laws 1852, Ch. 375 109
See Assent.

TAX-SALES OF LAND—*Invalid if Information refused.*] Where land has been sold for taxes, and the public officer refuses to do his duty in giving the party the necessary information to enable him to redeem—and thereby redemption is prevented—the deed of such officer will convey no title to the purchaser.

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PAGE

But if such officer has already given the necessary information by furnishing a bill of the amount to be paid, his refusal to furnish a second bill is not of itself evidence of official neglect.
VAN BENTHUYSEN *v.* SAWYER 206

TIME OF CONSUMATION OF CONTRACT—Letter or Telegram 248
See CONTRACT. 2.

——— OFFER—Costs—Code, § 385 266
See COSTS. 2.

TITLE—Damages to Real Estate—Evidence 307
See EVIDENCE. 2.

TOWN TAX-PAYERS, ASSENT of, to Bonds—Laws 1852, Ch. 375 109
See ASSENT.

TREATMENT, CRUEL—Condonation—Cohabitation 103
See CONDONATION.

TRESPASSER BUILDS—*Building passes with Realty, when.*] If a trespasser erects a building upon the land of another without any agreement or understanding in respect thereto, such building becomes a part of the realty, and passes therewith.
RITCHMYER *v.* MORSS 355

TRESPASS—Life Estate—Lease—When action maintainable 346
See LIFE ESTATE.

TRUSTEES—Statute of Frauds 350
See STATUTE OF FRAUDS.

TRUSTEE'S PURCHASE OF TRUST PROPERTY *in good faith.*] It is well settled that a person standing in a fiduciary relation to another cannot, in such relation, be allowed to purchase the property in respect to which such relation was created, or exists.

Thus, an agent cannot purchase for himself the property of his principal, as assignee for the benefit of creditors the property of his assignor, &c. Nor can a trustee purchase the property of his *cestui que trust.*

On setting aside an assignment accepted by the trustees in good faith, their sales under it will be ratified, and they will be indemnified in respect to all bonâ fide transactions thereunder.
COLBURN *v.* MORTON 145

USES AND TRUSTS, Statute of—Personal Property 348
See STATUTE OF USES AND TRUSTS.

USURY *a Personal Defence.*] Usury is a personal defence, and can be made available only by the borrower, not by third parties.

And none but a party to a usurious contract, or his heirs, devisees, or personal representatives, can avoid a usurious contract on account of usury.
CHAMBERLAIN *v.* DEMPSEY 257

VALUE OF MASTER'S INTEREST, not special 172
See MASTER'S INTEREST.

WHEN APPEAL DETERMINED SUFFICIENT..... 116
See APPEAL. 4.

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WILL—*Leases in Fee—Words of Perpetuity.*] Where the introductory clause of a will is as follows, "And as for that worldly estate wherewith it hath pleased God to bless me, I dispose of as follows," it may be deemed to be the intention of the testator to dispose of all his estate by the will; so that a subsequent devise

But where there is no residuary clause, either as to land or personal estate, and the devise has respect to land alone, it may be otherwise.

VANDERZEE *v.* VANDERZEE 92

without words of perpetuity, may convey a fee, when there is a residuary clause in the will as to personal estate.

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